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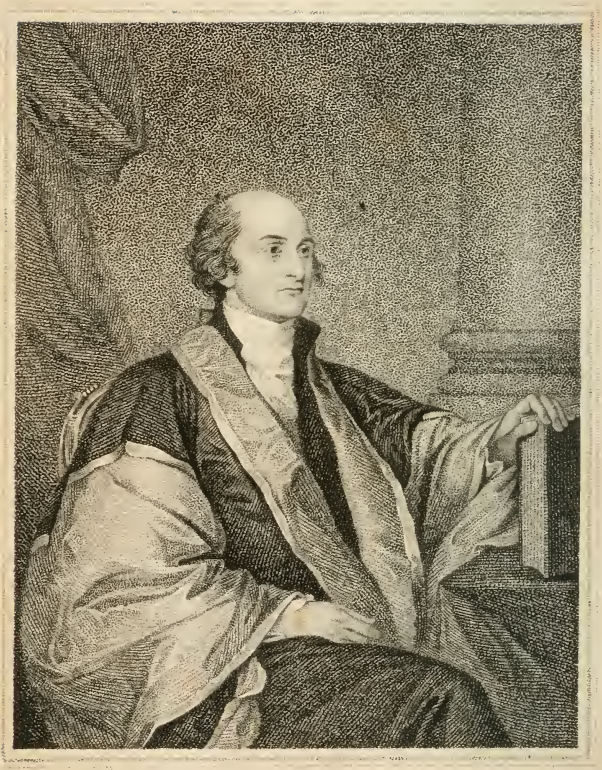

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JOHN JAY

THE

FEDERALIST,

ON THE NEW CONSTITUTION;

WRITTEN IN 1788,

BY MR. HAMILTON, MR. JAY AND MR. MADISON.

TO WHICH IS ADDED,

PACIFICUS,

ON THE PROCLAMATION OF NEUTRALITY.

WRITTEN IN 1793,

BY MR. HAMILTON.

A NEW EDITION, WITH THE NAMES AND PORTRAITS OF THE SEVERAL WRITERS.

IN TWO VOLUMES.

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THE FEDERALIST.

NUMBER XLVII.

BY MR. MADISON.

The meaning of the Maxim, which requires a Separation of the Departments of Power, examined and ascertained.

HAVING reviewed the general form of the proposed government, and the general mass of power allotted to it; I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments, ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favour of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice, to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which

the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary, to inspire an universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavour, in the first place, to ascertain his meaning on this point.

The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England as the

standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure then not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British constitution, we must perceive, that the legislative, executive, and judiciary departments, are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns; which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him; can be removed by him on the address of the two houses of parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department, forms also a great constitutional council to the executive chief; as on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction, in all other cases. The judges again are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred, that in saying, " there can be no liberty, where the legislative " and executive powers are united in the same per- " son, or body of magistrates;" or, " if the power " of judging be not separated from the legislative

" and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and still more conclusively illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would not have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body, had possessed the supreme judiciary, or the supreme executive authority.— This, however, is not among the vices of that constitution. The magistrate, in whom the whole executive power resides, cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act; though by the joint act of two of its branches, the judges may be removed from their offices; and though one of its branches is possessed of the judicial power in the last resort. The entire legislature again can exercise no executive prerogative, though of one its branches* constitutes the supreme executive magistracy; and another, on the impeachment of a

* The King.

third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim, are a further demonstration of his meaning. "When the legislative and executive powers are "united in the same person or body," says he, "there can be no liberty, because apprehensions "may arise lest *the same* monarch or senate should "*enact* tyrannical laws, to *execute* them in a tyran-"nical manner." Again, "Were the power of "judging joined with the legislative, the life and "liberty of the subject would be exposed to arbi-"trary control, for *the judge* would then be *the le-*"*gislator*. Were it joined to the executive power, "*the judge* might behave with all the violence of "*an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several states, we shall find, notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, that there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New-Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments; and has qualified the doctrine by declaring, "that the legislative, executive, and judiciary "powers, ought to be kept as separate from, and "independent of each other, *as the nature of a free* "*government will admit; or as is consistent with that*

" *chain of connexion, that binds the whole fabric of* " *the constitution in one indissoluble bond of unity and* " *amity.*" Her constitution accordingly mixes these departments in several respects. The senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The president, who is the head of the executive department, is the presiding member also of the senate; and besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department; and this council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department, are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient, though less pointed caution, in expressing this fundamental article of liberty. It declares, " that the legislative department shall never exer- " cise the executive and judicial powers, or either " of them: The executive shall never exercise the " legislative and judicial powers, or either of them: " The judicial shall never exercise the legislative " and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no further, than to prohibit any one of the entire departments, from exercising the powers of another department. In the very constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative

body; and the senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department again, are appointable by the executive department, and removeable by the same authority, on the address of the two legislative branches. Lastly, a number of the officers of government, are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the constitution have in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode-Island and Connecticut, because they were formed prior to the revolution; and even before the principle under examination, had become an object of political attention.

The constitution of New-York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger, of improperly blending the different departments. It gives, nevertheless, to the executive magistrate a partial control over the legislative department; and what is more, gives a like control to the judiciary department, and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment, members of the legislative, are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors, consists of one branch of the legislature, and the principal members of the judiciary department.

The constitution of New-Jersey, has blended the

different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature, is chancellor, and ordinary, or surrogate; is a member of the supreme court of appeals, and president with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the court of appeals. The members of the judiciary department are appointed by the legislative department, and removeable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania*, the president, who is head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachments for trial of all officers, judiciary as well as executive. The judges of the supreme court, and justices of the peace, seem also to be removeable by the legislature; and the executive power of pardoning in certain cases to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the state.

In Delaware*, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed three by each of the legislative branches, constitute the supreme court of appeals: He is joined with the legislative department in the appointment of the other

* The constitutions of these states have been since altered.

judges. Throughout the state, it appears that the members of the legislature may at the same time be justices of the peace. In this state, the members of one branch of it are EX OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government, ought to be for ever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary, by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, "that the "legislative, executive, and judiciary departments, "shall be separate and distinct; so that neither ex- "ercise the powers properly belonging to the other; "nor shall any person exercise the powers of more "than one of them at the same time; except that "the justices of county courts shall be eligible to "either house of assembly." Yet we find not only this express exception, with respect to the members of the inferior courts; but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter, are triennially displaced at the pleasure of the legislature; and that all the principal officers, both executive and judiciary, are filled by the same department. The executive prerogative of pardoning,

also, is one case vested in the legislative department.

The constitution of North-Carolina, which declares, "that the legislative, executive, and supreme judicial powers of government, ought to "be for ever separate and distinct from each other," refers at the same time to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South-Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the state.

In the constitution of Georgia, it is declared, that "the legislative, executive, and judiciary departments, "shall be separate and distinct, so that neither exercise "the powers properly belonging to the other." Yet we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardoning, to be finally exercised by the same authority. Even justices of the peace, are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments, have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several state governments. I am fully aware, that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience,

under which they were framed. It is but too obvious, that, in some instances, the fundamental principle under consideration, has been violated by too great a mixture, and even an actual consolidation of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed constitution, of violating a sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS.

NUMBER XLVIII.

BY MR. MADISON.

The same Subject continued, with a View to the means of giving efficacy in Practice to that Maxim.

IT was shown in the last paper, that the political apothegm there examined, does not require that the legislative, executive, and judiciary departments, should be wholly unconnected with each other. I shall undertake in the next place to show, that unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the max-

im requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that, in reference to each other, neither of them ought to possess, directly or indirectly, an over-ruling influence in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that

no task can be less pleasing, than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government, where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended on some favourable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition

of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.

The legislative department, derives a superiority in our governments, from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes, on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land-marks, still less uncertain, projects of usurpation by either of these departments, would immediately betray and defeat themselves. Nor is this all: As the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments; a dependence is thus created, in the latter which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might collect vouchers in abundance from the records and archives of every state in the union. But as a more concise, and at the same time, equally satisfactory evidence, I will refer to the example of

two states, attested by two unexceptionable authorities.

The first example is that of Virginia, a state which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who besides his other advantages for remarking the operation of the government, was himself the chief magistrate of the state. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on the state of Virginia." (p. 195.) "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots, would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments, should be separate and distinct, so

" that no person should exercise the powers of more " than one of them at the same time. *But no bar-* " *rier was provided between these several powers.* The " judiciary and executive members were left depen- " dent on the legislative for their subsistence in " office, and some of them for their continuance in " it. If, therefore, the legislature assumes execu- " tive and judiciary powers, no opposition is likely " to be made; nor if made, can be effectual; be- " cause in that case, they may put their proceedings " into the form of an act of assembly, which will " render them obligatory on the other branches. " They have accordingly, *in many* instances, *decided* " *rights* which should have been left to *judiciary* " *controversy;* and *the direction of the executive, dur-* " *ing the whole time of their session, is becoming ha-* " *bitual and familiar.*"

The other state which I shall take for an example, is Pennsylvania; and the other authority the council of censors which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was " to inquire whether " the constitution had been preserved inviolate in " every part; and whether the legislative and ex- " ecutive branches of government, had performed " their duty as guardians of the people, or assumed " to themselves, or exercised other or greater pow- " ers than they are entitled to by the constitution." In the execution of this trust, the council were necessarily led to a comparison, of both the legislative and executive proceedings, with the constitutional powers of these departments: and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that

the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution, against improper acts of the legislature.

The constitutional trial by jury had been violated; and powers assumed, which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war: But the greater part of them, may be considered as the spontaneous shoots of an ill-constituted government.

It appears also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head. *First.* A great proportion of the instances, were either immediately produced by the necessities of the war, or recommended by congress or the commander in chief. *Second.* In most of the other instances, they conformed either to the declared or the known senti-

ments of the legislative department. *Third.* The executive department of Pennsylvania is distinguished from that of the other states, by the number of members composing it. In this respect it has as much affinity to a legislative assembly, as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence; unauthorized measures would of course be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS.

NUMBER XLIX.

BY MR. HAMILTON.

The same Subject continued, with the same View.

THE author of the "Notes on the state of Virginia," quoted in the last paper, has subjoined to that valuable work, the draught of a constitution, which had been prepared in order to be laid before a convention expected to be called in 1783, by the

legislature, for the establishment of a constitution for that commonwealth. The plan, like every thing from the same pen, marks a turn of thinking original, comprehensive, and accurate; and is the more worthy of attention, as it equally displays a fervent attachment to republican government, and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power, against the invasions of the stronger, is perhaps altogether his own, and as it immediately relates to the subject of our present inquiry, ought not to be overlooked.

His proposition is, "that whenever any two of "the three branches of government shall concur in "opinion, each by the voices of two thirds of their "whole number, that a convention is necessary for "altering the constitution, or *correcting breaches of* "*it*, a convention shall be called for the purpose."

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how

are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves; who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove, that a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

In the first place, the provision does not reach the case of a combination of two of the departments, against a third. If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain to its interest either of the others, or even one third of its members, the remaining department could derive no advantage from this remedial provision. I do not dwell, however, on this objection, because it may be thought to lie rather against the modification of the principle, than against the principle itself.

In the next place, it may be considered as an objection inherent in the principle, that, as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite

stability. If it be true that all governments rest on opinion, it is no less true, that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated. When the examples, which fortify opinion, are ancient, as well as numerous, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws, would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers, is as little to be expected, as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.

The danger of disturbing the public tranquillity, by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honour to the virtue and intelligence of the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect, that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled

the ordinary diversity of opinions on great national questions; of an universal ardour for new and opposite forms, produced by an universal resentment and indignation against the ancient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is, that the decisions which would probably result from such appeals, would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is, to an aggrandizement of the legislative, at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments, are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy; and their administration is always liable to be discoloured and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connexions of blood, of friendship, and of acquaintance, embrace a great proportion of

the most influential part of the society. The nature of their public trust implies a personal weight with the people, and that they are more immediately the confidential guardians of their rights and liberties. With these advantages, it can hardly be supposed, that the adverse party would have an equal chance for a favourable issue.

But the legislative party would not only be able to plead their cause most successively with the people: They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might, however, sometimes happen, that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden, as to admit of no specious colouring. A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favourite of the people. In such a posture of things, the public decision might be less swayed by prepossessions in favour of the legislative party. But still it could never be expected to turn on the true merits of the question. It would inevitably be con

nected with the spirit, of parties pre-existing, or springing out of the question itself. It would be connected with persons of distinguished character, and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions*, therefore, not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

We found in the last paper, that mere declarations in the written constitution, are not sufficient to restrain the several departments within their legal limits. It appears in this, that occasional appeals to the people, would be neither a proper, nor an effectual provision, for that purpose. How far the provisions of a different nature contained in the plan above quoted, might be adequate, I do not examine. Some of them are unquestionably founded on sound political principles, and all of them are framed with singular ingenuity and precision.

PUBLIUS.

NUMBER L.

BY MR. HAMILTON.

The same Subject continued, with the same View.

IT may be contended, perhaps, that instead of *occasional* appeals to the people, which are liable

to the objections urged against them, *periodical* appeals are the proper and adequate means of *preventing and correcting infractions of the constitution.*

It will be attended to, that in the examination of these expedients, I confine myself to their aptitude for *enforcing* the constitution, by keeping the several departments of power within their due bounds; without particularly considering them, as provisions for *altering* the constitution itself. In the first view, appeals to the people at fixed periods, appear to be nearly as ineligible, as appeals on particular occasions as they emerge. If the periods be separated by short intervals, the measures to be reviewed and rectified, will have been of recent date, and will be connected with all the circumstances which tend to vitiate and pervert the result of occasional revisions. If the periods be distant from each other, the same remark will be applicable to all recent measures; and in proportion as the remoteness of the others may favour a dispassionate review of them, this advantage is inseparable from inconveniencies which seem to counterbalance it. In the first place, a distant prospect of public censure would be a very feeble restraint on power from those excesses, to which it might be urged by the force of present motives. Is it to be imagined, that a legislative assembly, consisting of a hundred or two hundred members, eagerly bent on some favourite object, and breaking through the restraints of the constitution in pursuit of it, would be arrested in their career, by considerations drawn from a censorial revision of their conduct at the future distance of ten, fifteen, or twenty years? In the next place, the abuses would often have completed their mischievous effects, before the remedial provision would

be applied. And in the last place, where this might not be the case, they would be of long standing, would have taken deep root, and would not easily be extirpated.

The scheme of revising the constitution, in order to correct recent breaches of it as well as for other purposes, has been actually tried in one of the states. One of the objects of the council of censors, which met in Pennsylvania, in 1783 and 1784, was, as we have seen, to inquire "whether the consti- "tution had been violated; and whether the legis- "lative and executive departments had encroach- "ed on each other." This important and novel experiment in politics, merits, in several points of view, very particular attention. In some of them it may, perhaps, as a single experiment, made under circumstances somewhat peculiar, be thought to be not absolutely conclusive. But, as applied to the case under consideration, it involves some facts which I venture to remark, as a complete and satisfactory illustration of the reasoning which I have employed.

First. It appears, from the names of the gentlemen who composed the council, that some, at least, of its most active and leading members, had also been active and leading characters in the parties which pre-existed in the state.

Second. It appears that the same active and leading members of the council, had been active and influential members of the legislative and executive branches, within the period to be reviewed; and even patrons or opponents of the very measures to be thus brought to the test of the constitution.—Two of the members had been vice-presidents of the state, and several others members of the execu-

tive council within the seven preceding years.—One of them had been speaker, and a number of others, distinguished members of the legislative assembly, within the same period.

Third. Every page of their proceedings witnesses the effect of all these circumstances on the temper of their deliberations. Throughout the continuance of the council, it was split into two fixed and violent parties. The fact is acknowledged and lamented by themselves. Had this not been the case, the face of their proceedings exhibits a proof equally satisfactory. In all questions, however unimportant in themselves, or unconnected with each other, the same names stand invariably contrasted on the opposite columns. Every unbiassed observer, may infer without danger of mistake, and at the same time, without meaning to reflect on either party, or any individuals of either party, that unfortunately *passion*, not *reason*, must have presided over their decisions. When men exercise their reason coolly and freely, on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

Fourth. It is at least problematical, whether the decisions of this body do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places.

Fifth. I have never understood that the decisions of the council on constitutional questions, whether rightly or erroneously formed, have had any effect in varying the practice founded on legislative constructions. It even appears, if I mistake

not, that in one instance, the cotemporary legislature denied the constructions of the council, and actually prevailed in the contest.

This censorial body, therefore, proves at the same time, by its researches, the existence of the disease; and by its example, the inefficacy of the remedy.

This conclusion cannot be invalidated by alleging, that the state in which the experiment was made, was at that crisis, and had been for a long time before, violently heated and distracted by the rage of party. Is it to be presumed, that at any future septennial epoch, the same state will be free from parties? Is it to be presumed that any other state, at the same, or any other given period, will be exempt from them? Such an event ought to be neither presumed nor desired; because an extinction of parties necessarily implies either an universal alarm for the public safety, or an absolute extinction of liberty.

Were the precaution taken of excluding from the assemblies elected by the people to revise the preceding administration of the government, all persons who should have been concerned in the government within the given period, the difficulties would not be obviated. The important task would probably devolve on men, who, with inferior capacities, would in other respects be little better qualified. Although they might not have been personally concerned in the administration, and therefore not immediately agents in the measures to be examined; they would probably have been involved in the parties connected with these measures, and have been elected under their auspices.

PUBLIUS.

NUMBER LI.

BY MR. HAMILTON.

The same Subject continued, with the same View, and concluded.

To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full developement of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which, to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legis-

lative, and judiciary magistracies, should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments, would be less difficult in practice, than it may in contemplation appear. Some difficulties, however, and some additional expense, would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice, which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be

connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner, as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with

each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments, by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature, appears, at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connexion between this weaker department, and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several state constitutions, and to the federal constitution, it will be found, that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place it in a very interesting point of view.

First. In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government

into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

Second. It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary, or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in

little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject, must particularly recommend a proper federal system, to all the sincere and considerate friends of republican government: since it shows, that in exact proportion, as the territory of the union may be formed into more circumscribed confederacies, or states, oppressive combinations of a majority will be facilitated, the best security under the republican form, for the rights of every class of citizens, will be diminished; and consequently, the stability and independence of some member of the government, the only other security must be proportionably increased. Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger: And as in the latter state even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak, as well as themselves: so in the former state, will the more powerful factions be gradually induced by a like motive, to wish for a government which will protect all

parties, the weaker as well as the more powerful. It can be little doubted, that if the state of Rhode-Island was separated from the confederacy, and left to itself, the insecurity of rights under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people, would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good: Whilst there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter: or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle.

PUBLIUS.

NUMBER LII.

BY MR. HAMILTON.

Concerning the House of Representatives, with a view to the qualifications of the electors and elected, and the time of service of the Members.

FROM the more general inquiries pursued in the four last papers, I pass on to a more particular examination of the several parts of the government. I shall begin with the house of representatives.

The first view to be taken of this part of the government, relates to the qualifications of the electors, and the elected.

Those of the former, are to be the same with those of the electors of the most numerous branch of the state legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution. To have left it open for the occasional regulation of the congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the states, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependant on the state governments, that branch of the federal government which ought to be dependant on the people alone. To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as

it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state; because it is conformable to the standard already established, or which may be established by the state itself. It will be safe to the United States; because, being fixed by the state constitutions, it is not alterable by the state governments; and it cannot be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution.

The qualifications of the elected, being less carefully and properly defined by the state constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States, must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the state he is to represent, and during the time of his service, must be in no office under the United States. Subject to these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the representatives are to be elected, falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered; first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

First. As it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential, that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections, are unquestionably the only policy, by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose, does not appear to be susceptible of any precise calculation—and must depend on a variety of circumstances, with which it may be connected. Let us consult experience, the guide that ought always to be followed, whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being but imperfectly known to ancient polity; it is in more modern times only that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known, and which bear the greatest analogy to our particular case. The first to which this character ought to be applied, is the house of commons in Great-Britain. The history of this branch of the English constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove, that parliaments were to *sit* only, every year; not that they were to be *elected* every year. And even these annual sessions were left so much at the discretion of the monarch, that under various pretexts, very long and danger-

ous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles IId, that the intermissions should not be protracted beyond a period of three years. On the accession of William IIId, when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people, that parliaments ought to be held *frequently*. By another statute which passed a few years later in the same reign, the term "frequently," which had alluded to the triennial period settled in the time of Charles IId, is reduced to a precise meaning, it being expressly enacted, that a new parliament shall be called within three years after the determination of the former. The last change, from three to seven years, is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears, that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with some other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us, that biennial elections under the federal system, cannot possibly be dangerous to the requisite dependence of the house of representatives on their constituents.

Elections in Ireland, till of late, were regulated entirely by the discretion of the crown, and were seldom repeated, except on the accession of a new prince, or some other contingent event. The parliament which commenced with George IId, was continued throughout his whole reign, a period of about thirty-five years. The only dependence of the representative on the people, consisted in the right of the latter to supply occasional vacancies, by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the control of the crown, over the subjects of their deliberation. Of late, these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform, must be left to further experience. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be, that if the people of that country have been able, under all these disadvantages, to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty, which might depend on a due connexion between their representatives and themselves.

Let us bring our inquiries nearer home. The example of these states, when British colonies, claims particular attention; at the same time that it is so well known, as to require little to be said on it. The principle of representation, in one branch of the legislature at least, was established in all of

them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer, from the spirit and conduct of the representatives of the people, prior to the revolution, that biennial elections would have been dangerous to the public liberties? The spirit which every where displayed itself, at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proof that a sufficient portion of liberty had been every where enjoyed, to inspire both a sense of its worth, and a zeal for its proper enlargement. This remark holds good, as well with regard to the then colonies, whose elections were least frequent, as to those whose elections were most frequent. Virginia was the colony which stood first in resisting the parliamentary usurpations of Great-Britain; it was the first also in espousing, by public act, the resolution of independence. In Virginia, nevertheless, if I have not been misinformed, elections under the former government were septennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in those instances was probably accidental; and still less of any advantage in *septennial* elections, for when compared with a greater frequency, they are inadmissible; but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from *biennial* elections.

The conclusion resulting from these examples will be not a little strengthened, by recollecting three circumstances. The first is, that the federal legislature will possess a part only of [illegible] legislative authority which is vested completely in the British parliament; and which, with a few

exceptions, was exercised by the colonial assemblies, and the Irish Legislature. It is a received and well founded maxim, that, where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted. In the second place, it has, on another occasion, been shown, that the federal legislature will not only be restrained by its dependence on the people, as other legislative bodies are; but that it will be moreover watched and controlled by the several collateral legislatures, which other legislative bodies are not. And in the third place, no comparison can be made between the means that will be possessed by the more permanent branches of the federal government, for seducing, if they should be disposed to seduce, the house of representatives from their duty to the people; and the means of influence over the popular branch, possessed by the other branches of governments above cited. With less power, therefore, to abuse, the federal representatives can be less tempted on one side, and will be doubly watched on the other.

PUBLIUS.

NUMBER LIII.

BY MR. HAMILTON.

The same Subject continued, with a View of the term of service of the Members.

I SHALL here, perhaps, be reminded of a current observation, "that where annual elections end, ty-

"ranny begins." If it be true, as has been often remarked, that sayings which become proverbial, are generally founded in reason, it is not less true, that, when once established, they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the instance before us. What is the reason on which this proverbial observation is founded? No man will subject himself to the ridicule of pretending, that any natural connexion subsists between the sun or the seasons, and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not, in this respect, confined to any single point of time; but lies within extremes, which afford sufficient latitude for all the variations that may be required by the various situations and circumstances of civil society.

The election of magistrates might be, if it were found expedient, as in some instances it actually has been, daily, weekly, or monthly, as well as annual; and if circumstances may require a deviation from the rule on one side, why not also on the other side? Turning our attention to the periods established among ourselves, for the election of the most numerous branches of the state legislatures, we find them by no means coinciding any more in this instance, than in the elections of other civil magistrates. In Connecticut and Rhode-Island, the periods are half-yearly. In the other states, South-Carolina excepted, they are annual. In South-Carolina, they are biennial; as is proposed in the federal government. Here is a difference, as four to one, between the longest and the shortest periods; and yet it would be not easy to show, that Connecticut or Rhode-Island is better governed, or enjoys a

greater share of rational liberty than South-Carolina; or that either the one or the other of these states are distinguished in these respects, and by these causes, from those whose elections are different from both.

In searching for the grounds of this doctrine, I can discover but one, and that is wholly inapplicable to our case. The important distinction, so well understood in America, between a constitution established by the people, and unalterable by the government; and a law established by the government, and alterable by the government, seems to have been little understood, and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great-Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the constitution, it is maintained, that the authority of the parliament is transcendant and uncontrollable, as well with regard to the constitution, as the ordinary objects of legislative provision. They have accordingly, in several instances actually changed, by legislative acts, some of the most fundameneal articles of the government. They have in particular, on several occasions, changed the period of election; and on the last occasion, not only introduced septennial, in place of triennial elections; but, by the same act, continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the corner stone;

and has led them to seek for some security to liberty, against the danger to which it is exposed.—Where no constitution, paramount to the government, either existed or could be obtained, no constitutional security, similar to that established in the United States, was to be attempted. Some other security, therefore, was to be sought for; and what better security would the case admit, than that of selecting and appealing to some simple and familiar portion of time, as a standard for measuring the danger of innovations, for fixing the national sentiment, and for uniting the patriotic exertions? The most simple and familiar portion of time, applicable to the subject, was that of a year; and hence the doctrine has been inculcated, by a laudable zeal to erect some barrier against the gradual innovations of an unlimited government, that the advance towards tyranny, was to be calculated by the distance of departure from the fixed point of annual elections. But what necessity can there be of applying this expedient to a government, limited as the federal government will be, by the authority of a paramount constitution? Or who will pretend, that the liberties of the people of America will not be more secure under biennial elections, unalterably fixed by such a constitution, than those of any other nation would be, where elections were annual, or even more frequent, but subject to alterations by the ordinary power of the government.

The second question stated is, whether biennial elections be necessary or useful? The propriety of answering this question in the affirmative, will appear from several very obvious considerations.

No man can be a competent legislator, who does not add to an upright intention and a sound judg-

ment, a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information, which lie within the compass of men in private, as well as public stations. Another part can only be obtained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge, requisite to the due performance of the service. The period of legislative service, established in most of the states for the more numerous branch, is, as we have seen, one year. The question then may be put into this simple form: Does the period of two years bear no greater proportion to the knowledge requisite for federal legislation, than one year does to the knowledge requisite for state legislation? The very statement of the question, in this form, suggests the answer that ought to be given to it.

In a single state, the requisite knowledge relates to the existing laws, which are uniform throughout the state, and with which all the citizens are more or less conversant; and to the general affairs of the state, which lie within a small compass, are not very diversified, and occupy much of the attention and conversation of every class of people. The great theatre of the United States presents a very different scene. The laws are so far from being uniform, that they vary in every state; whilst the public affairs of the union are spread throughout a very extensive region, and are extremely diversified by the local affairs connected with them, and can with difficulty be correctly learnt in any other place, than in the central councils, to which a knowledge of them will be

brought by the representatives of every part of the empire. Yet some knowledge of the affairs, and even of the laws of all the states, ought to be possessed by the members from each of the states. How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different states? How can the trade between tha different states be duly regulated, without some knowledge of their relative situations in these, and other points? How can taxes be judiciously imposed, and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different states? How can uniform regulations for the militia be duly provided, without a similar knowledge of some internal circumstances, by which the states are distinguished from each other? These are the principal objects of federal legislation, and suggest most forcibly, the extensive information which the representatives ought to acquire. The other inferior objects will require a proportional degree of information with regard to them.

It is true, that all these difficulties will, by degrees, be very much diminished. The most laborious task will be the proper inauguration of the government, and the primeval formation of a federal code. Improvements on the first draught, will every year become both easier and fewer. Past transactions of the government, will be a ready and accurate source of information to new members. The affairs of the union, will become more and more objects of curiosity and conversation among the citizens at large. And the increased intercourse among those of different states, will contribute not a little to diffuse a

mutual knowledge of their affairs, as this again will contribute to a general assimilation of their manners and laws. But, with all these abatements, the business of federal legislation must continue so far to exceed, both in novelty and difficulty, the legislative business of a single state, as to justify the longer period of service assigned to those who are to transact it.

A branch of knowledge, which belongs to the acquirements of a federal representative, and which has not been mentioned, is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with ths commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government. And although the house of representatives is not immediately to participate in foreign negociations and arrangements, yet from the necessary connexion between the several branches of public affairs, those particular subjects will frequently deserve attention in the ordinary course of legislation, and will sometimes demand particular legislative sanction and cooperation. Some portion of this knowledge may, no doubt, be acquired in a man's closet; but some of it also can only be derived from the public sources of information; and all of it will be acquired to best effect, by a practical attention to the subject, during the period of actual service in the legislature.

There are other considerations, of less importance perhaps, but which are not unworthy of notice. The distance which many of the representatives will be obliged to travel, and the arrangements rendered

necessary by that circumstance, might be much more serious objections with fit men for this service, if limited to a single year, than if extended to two years. No argument can be drawn on this subject, from the case of the delegates to the existing congress. They are elected annually, it is true; but their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people, would not be governed by the same principle.

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the house of representatives and the senate.

It is an inconvenience mingled with the advantages of our frequent elections, even in single states, where they are large, and hold but one legislative session in the year, that spurious elections cannot be investigated and annulled, in time for the decision to have its due effect. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course, is sure of holding it a sufficient time to answer his purposes. Hence a very pernicious encouragement is given to the use of unlawful means, for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious

abuse, particularly in the more distant states. Eac house is, as it necessarily must be, the judge of th elections, qualifications, and returns of its members, and whatever improvements may be suggested by experience, for simplifying and accelerating the process in disputed cases, so great a portion of a year would unavoidably elapse, before an illegitimate member could be dispossessed of his seat, that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat.

All these considerations taken together, warrant us in affirming, that biennial elections will be as useful to the affairs of the public, as we have seen that they will be safe to the liberties of the people.

PUBLIUS.

NUMBER LIV.

BY MR. HAMILTON.

The same Subject continued, with a View to the ratio of Representation.

THE next view which I shall take of the house of representatives, relates to the apportionment of its members among the several states, which is to be determined by the same rule, with that of direct taxes.

It is not contended, that the number of people in each state, ought not to be the standard for regulating the proportion of those, who are to represent the people of each state. The establishment of the same rule for the apportionment of taxes, will probably be as little contested; though the rule itself in

this case, is by no means founded on the same principle. In the former case, the rule is understood to refer to the personal rights of the people, with which it has a natural and universal connexion. In the latter, it has reference to the proportion of wealth, of which it is in no case a precise measure, and in ordinary cases, a very unfit one. But notwithstanding the imperfection of the rule, as applied to the relative wealth and contributions of the states, it is evidently the least exceptionable among those that are practicable; and had too recently obtained the general sanction of America, not to have found a ready preference with the convention.

All this is admitted, it will perhaps be said: But does it follow from an admission of numbers for the measure of representation, or of slaves combined with free citizens, as a ratio of taxation, that slaves ought to be included in the numerical rule of representation? Slaves are considered as property, not as persons. They ought, therefore, to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation, which is regulated by a census of persons. This is the objection, as I understand it, stated in its full force. I shall be equally candid in stating the reasoning which may be offered on the opposite side.

We subscribe to the doctrine, might one of our southern brethren observe, that representation relates more immediately to persons, and taxation more immediately to property; and we join in the application of this distinction to the case of our slaves. But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities; being considered

by our laws, in some respects, as persons, and in other respects, as property. In being compelled to labour not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty, and chastised in his body, by the capricious will of his owner, the slave may appear to be degraded from the human rank, and classed with those irrational animals, which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labour and his liberty; and in being punishable himself for all violence committed against others; the slave is no less evidently regarded by the law as a member of the society; not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be disputed that those are the proper criterion; because it is only under the pretext, that the laws have transformed the negroes into subjects of property, that a place is denied to them in the computation of numbers; and it is admitted that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.

This question may be placed in another light. It is agreed on all sides, that numbers [illegible] the best scale of wealth and taxation, as they are [illegible] only proper scale of representation. Would the co[illegible]ention have

been impartial or consistent, if they had rejected the slaves from the list of inhabitants, when the shares of representation were to be calculated; and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be reasonably expected, that the southern states would concur in a system, which considered their slaves in some degree as men, when burdens were to be imposed, but refused to consider them in the same light, when advantages were to be conferred? Might not some surprise also be expressed, that those who reproach the southern states with the barbarous policy of considering as property, a part of their human brethren, should themselves contend, that the government to which all the states are to be parties, ought to consider this unfortunate race more completely in the unnatural light of property, than the very laws of which they complain?

It may perhaps be replied, that slaves are not included in the estimate of representatives in any of the states possessing them. They neither vote themselves, nor increase the votes of their masters. Upon what principle then, ought they to be taken into the federal estimate of representation? In rejecting them altogether, the constitution would, in this respect, have followed the very laws which have been appealed to, as the proper guide.

This objection is repelled by a single observation. It is a fundamental principle of the proposed constitution, that as the aggregate number of representatives allotted to the several states, is to be determined by a federal rule, founded on the aggregate number of inhabitants; so the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the

state itself may designate. The qualifications on which the right of suffrage depend, are not perhaps the same in any two states. In some of the states, the difference is very material. In every state, a certain proportion of inhabitants, are deprived of this right by the constitution of the state, who will be included in the census by which the federal constitution apportions the representatives. In this point of view, the southern states might retort the complaint, by insisting, that the principle laid down by the convention, required that no regard should be had to the policy of particular states towards their own inhabitants; and consequently, that the slaves, as inhabitants, should have been admitted into the census according to their full number, in like manner with other inhabitants, who, by the policy of other states, are not admitted to all the rights of citizens. A rigorous adherence, however, to this principle, is waived by those who would be gainers by it. All that they ask is, that equal moderation be shown on the other side. Let the case of the slaves be considered, as it is in truth a peculiar one. Let the compromising expedient of the constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifths of the *man*.

After all, may not another ground be taken on which this article of the constitution will admit of a still more ready defence? We have hitherto proceeded on the idea, that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property, than of the persons of in-

dividuals. The one, as well as the other, therefore, may be considered as represented by those who are charged with the government. Upon this principle it is, that in several of the states, and particularly in the state of New-York, one branch of the government is intended more especially to be the guardian of property; and is accordingly elected by that part of the society which is most interested in this object of government. In the federal constitution, this policy does not prevail. The rights of property are committed into the same hands, with the personal rights. Some attention ought, therefore, to be paid to property, in the choice of those hands.

For another reason, the votes allowed in the federal legislature to the people of each state, ought to bear some proportion to the comparative wealth of the states. States have not, like individuals, an influence over each other, arising from superior advantages of fortune. If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation, very frequently guide the votes of others to the objects of his choice; and through this imperceptible channel, the rights of property are conveyed into the public representation. A state possesses no such influence over other states. It is not probable, that the richest state in the confederacy, will ever influence the choice of a single representative, in any other state. Nor will the representatives of the larger and richer states, possess any other advantage in the federal legislature, over the representatives of other states, than what may result from their superior number alone; as far, therefore, as their superior wealth and

weight may justly entitle them to any advantage, it ought to be secured to them by a superior share of representation. The new constitution is, in this respect, materially different from the existing confederation, as well as from that of the United Netherlands, and other similar confederacies. In each of the latter, the efficacy of the federal resolutions, depends on the subsequent and voluntary resolutions of the states composing the union. Hence the states, though possessing an equal vote in the public councils, have an unequal influence, corresponding with the unequal importance of these subsequent and voluntary resolutions. Under the proposed constitution, the federal acts will take effect without the necessary intervention of the individual states. They will depend merely on the majority of votes in the federal legislature, and consequently each vote, whether proceeding from a larger or smaller state, or a state more or less wealthy or powerful, will have an equal weight and efficacy; in the same manner as the votes individually given in a state legislature, by the representatives of unequal counties or other districts, have each a precise equality of value and effect; or if there be any difference in the case, it proceeds from the difference in the personal character of the individual representative, rather than from any regard to the extent of the district from which he comes.

Such is the reasoning, which an advocate for the southern interests might employ on this subject: And although it may appear to be a little strained in some points, yet on the whole, I must confess, that it fully reconciles me to the scale of representation, which the convention have established.

In one respect, the establishment of a common mea-

sure for representation and taxation, will have a very salutary effect. As the accuracy of the census to be obtained by the congress, will necessarily depend, in a considerable degree, on the disposition, if not the co-operation of the states, it is of great importance that the states should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the states will have opposite interests, which will control and balance each other; and produce the requisite impartiality.

PUBLIUS.

NUMBER LV.

BY MR. HAMILTON.

The same Subject continued, in relation to the total number of the Body.

THE number of which the house of representatives is to consist, forms another and a very interesting point of view, under which this branch of the federal legislature may be contemplated. Scarce any article indeed in the whole constitution, seems to be rendered more worthy of attention, by the weight of character, and the apparent force of argument, with which it has been assailed.

The charges exhibited against it are, first, that so small a number of representatives, will be an unsafe depository of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents; thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few, on the depression of the many; fourthly, that defective as the number will be in the first instance, it will be more and more disproportionate, by the increase of the people, and the obstacles which will prevent a correspondent increase of the representatives.

In general it may be remarked on this subject, that no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature; nor is there any point on which the policy of the several states is more at variance; whether we compare their legislative assemblies directly with each other, or consider the proportions which they respectively bear to the number of their constituents. Passing over the difference between the smallest and largest states, as Delaware, whose most numerous branch consists of twenty-one representatives, and Massachusetts, where it amounts to between three and four hundred, a very considerable difference is observable among states nearly equal in population. The number of representatives in Pennsylvania, is not more than one fifth of that in the state last mentioned. New-York, whose population is to that of South-Carolina as six to five, has little more than one third of the number of representatives. As great a disparity prevails between the

states of Georgia and Delaware, or Rhode-Island. In Pennsylvania, the representatives do not bear a greater proportion to their constituents, than of one for every four or five thousand. In Rhode-Island, they bear a proportion of at least one for every thousand. And according to the constitution of Georgia, the proportion may be carried to one for every ten electors; and must unavoidably far exceed the proportion in any of the other states.

Another general remark to be made is, that the ratio between the representatives and the people, ought not to be the same, where the latter are very numerous, as where they are very few. Were the representatives in Virginia to be regulated by the standard in Rhode-Island, they would, at this time, amount to between four and five hundred; and twenty or thirty years hence, to a thousand. On the other hand, the ratio of Pennsylvania, if applied to the state of Delaware, would reduce the representative assembly of the latter to seven or eight members. Nothing can be more fallacious, than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power, than six or seven. But it does not follow, that six or seven hundred would be proportionably a better depository. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases, a certain number at least seems to be necessary, to secure the benefits of free consultation and discussion; and to guard against too easy a combination for improper purposes: As on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of

whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob.

It is necessary also to recollect here, the observations which were applied to the case of biennial elections. For the same reason that the limited powers of the congress, and the control of the state legislatures, justify less frequent elections than the public safety might otherwise require; the members of the congress need be less numerous than if they possessed the whole power of legislation, and were under no other than the ordinary restraints of other legislative bodies.

With these general ideas in our minds, let us weigh the objections which have been stated against the number of members proposed for the house of representatives. It is said, in the first place, that so small a number cannot be safely trusted with so much power.

The number of which this branch of the legislature is to consist, at the outset of the government, will be sixty-five. Within three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants; and within every successive period of ten years, the census is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture, that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimating the negroes in the proportion of three-fifths, it can scarcely be doubted, that the population of the United States will by that time, if it does not already, amount to three

millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred; and of fifty years, to four hundred. This is a number, which I presume will put an end to all fears, arising from the smallness of the body. I take for granted here, what I shall, in answering the fourth objection, hereafter show, that the number of representatives will be augmented, from time to time, in the manner provided by the constitution. On a contrary supposition, I should admit the objection to have very great weight indeed.

The true question to be decided then is, whether the smallness of the number, as a temporary regulation, be dangerous to the public liberty? Whether sixty-five members for a few years, and a hundred, or two hundred, for a few more, be a safe depository for a limited and well guarded power of legislating for the United States? I must own that I could not give a negative answer to this question, without first obliterating every impression which I have received, with regard to the present genius of the people of America, the spirit which actuates the state legislatures, and the principles which are incorporated with the political character of every class of citizens. I am unable to conceive, that the people of America, in their present temper, or under any circumstances which can speedily happen, will choose, and every second year repeat the choice, of sixty-five or an hundred men, who would be disposed to form and pursue a scheme of tyranny or treachery. I am unable to conceive, that the state legislatures, which must feel so many motives to watch, and which possess so many means of counteracting the federal legislature, would fail either to detect or to

defeat, a conspiracy of the latter against the liberties of their common constituents. I am equally unable to conceive that there are at this time, or can be in any short time in the United States, any sixty-five or an hundred men, capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trust committed to them. What change of circumstances, time, and a fuller population of our country, may produce, requires a prophetic spirit to declare, which makes no part of my pretensions. But judging from the circumstances now before us, and from the probable state of them within a moderate period of time, I must pronounce, that the liberties of America cannot be unsafe, in the number of hands proposed by the federal constitution.

From what quarter can the danger proceed? Are we afraid of foreign gold? If foreign gold could so easily corrupt our federal rulers, and enable them to ensnare and betray their constituents, how has it happened that we are at this time a free and independent nation? The congress which conducted us through the revolution, were a less numerous body than their successors will be; they were not chosen by, nor responsible to, their fellow-citizens at large; though appointed from year to year, and recallable at pleasure, they were generally continued for three years; and prior to the ratification of the federal articles, for a still longer term; they held their consultations always under the veil of secrecy; they had the sole transaction of our affairs with foreign nations; through the whole course of the war, they had the fate of their country more in their hands, than it is to be hoped will ever be the case with our

future representatives; and from the greatness of the prize at stake, and the eagerness of the party which lost it, it may well be supposed, that the use of other means than force would not have been scrupled: Yet we know by happy experience, that the public trust was not betrayed; nor has the purity of our public councils in this particular ever suffered, even from the whispers of calumny.

Is the danger apprehended from the other branches of the federal government? But where are the means to be found by the president or the senate, or both? Their emoluments of office, it is to be presumed, will not, and without a previous corruption of the house of representatives cannot, more than suffice for very different purposes: Their private fortunes, as they must all be American citizens, cannot possibly be sources of danger. The only means then which they can possess, will be in the dispensation of appointments. Is it here that suspicion rests her charge? Sometimes we are told, that this fund of corruption is to be exhausted by the president, in subduing the virtue of the senate. Now, the fidelity of the other house is to be the victim. The improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension. But fortunately, the constitution has provided a still further safeguard. The members of the congress are rendered ineligible to any civil offices, that may be created, or of which the emoluments may be increased, during the term of their election. No offices therefore can be dealt out to the existing members, but such as may

become vacant by ordinary casualties; and to suppose that these would be sufficient to purchase the guardians of the people, selected by the people themselves, is to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree, than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism, can restrain them from destroying and devouring one another.

PUBLIUS.

NUMBER LVI.

BY MR. HAMILTON.

The same Subject continued, in relation to the same Point.

THE *second* charge against the house of representatives is, that it will be too small to possess a due knowledge of the interests of its constituents.

As this objection evidently proceeds from a comparison of the proposed number of representatives, with the great extent of the United States, the number of their inhabitants, and the diversity of their interests, without taking into view, at the same time, the circumstances which will distinguish the congress from other legislative bodies, the best answer that can be given to it will be a brief explanation of these peculiarities.

It is a sound and important principle, that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further, than to those circumstances and interests to which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. In determining the extent of information required in the exercise of a particular authority, recourse then must be had to the objects within the purview of that authority.

What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.

A proper regulation of commerce requires much information, as has been elsewhere remarked; but as far as this information relates to the laws, and local situation of each individual state, a very few representatives would be sufficient vehicles of it to the federal councils.

Taxation will consist, in a great measure, of duties which will be involved in the regulation of

commerce. So far the preceding remark is applicable to this object. As far as it may consist of internal collections, a more diffusive knowledge of the circumstances of the state may be necessary. But will not this also be possessed in sufficient degree by a very few intelligent men, diffusively elected within the state? Divide the largest state into ten or twelve districts, and it will be found that there will be no peculiar local interest in either, which will not be within the knowledge of the representative of the district. Besides this source of information, the laws of the state, framed by representatives from every part of it, will be almost of themselves a sufficient guide. In every state there have been made, and must continue to be made, regulations on this subject, which will, in many cases, leave little more to be done by the federal legislature, than to review the different laws, and reduce them into one general act. A skilful individual in his closet, with all the local codes before him, might compile a law on some subjects of taxation for the whole union, without any aid from oral information; and it may be expected, that whenever internal taxes may be necessary, and particularly in cases requiring uniformity throughout the states, the more simple objects will be preferred. To be fully sensible of the facility which will be given to this branch of federal legislation, by the assistance of the state codes, we need only suppose for a moment, that this or any other state were divided into a number of parts, each having and exercising within itself a power of local legislation. Is it not evident that a degree of local information and preparatory labour, would be found in the several volumes of their proceedings, which would very much shorten the la-

bours of the general legislature, and render a much smaller number of members sufficient for it? The federal councils will derive great advantage from another circumstance. The representatives of each state will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts; but will probably in all cases have been members, and may even at the very time be members, of the state legislature, where all the local information and interests of the state are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States.

With regard to the regulation of the militia, there are scarcely any circumstances in reference to which local knowledge can be said to be necessary. The general face of the country, whether mountainous or level, most fit for the operations of infantry or cavalry, is almost the only consideration of this nature that can occur. The art of war teaches general principles of organization, movement, and discipline, which apply universally.

The attentive reader will discern, that the reasoning here used, to prove the sufficiency of a moderate number of representatives, does not, in any respect, contradict what was urged on another occasion, with regard to the extensive information which the representatives ought to possess, and the time that might be necessary for acquiring it. This information, so far as it may relate to local objects, is rendered necessary and difficult, not by a difference of laws and local circumstances within a single state, but of those among different states. Taking each state by itself, its laws are the same, and its interests but little diversified. A few men, therefore, will possess all the knowledge requisite for a proper re-

presentation of them. Were the interests and affairs of each individual state, perfectly simple and uniform, a knowledge of them in one part, would involve a knowledge of them in every other, and the whole state might be competently represented by a single member taken from any part of it. On a comparison of the different states together, we find a great dissimilarity in their laws, and in many other circumstances connected with the objects of federal legislation, with all of which the federal representatives ought to have some acquaintance. Whilst a few representatives, therefore, from each state, may bring with them a due knowledge of their own state, every representative will have much information to acquire concerning all the other states. The changes of time, as was formerly remarked, on the comparative situation of the different states, will have an assimilating tendency. The effect of time on the internal affairs of the states, taken singly, will be just the contrary. At present, some of the states are little more than a society of husbandmen. Few of them have made much progress in those branches of industry, which give a variety and complexity to the affairs of a nation. These, however, will in all of them be the fruits of a more advanced population; and will require, on the part of each state, a fuller representation. The foresight of the convention, has accordingly taken care, that the progress of population, may be accompanied with a proper increase of the representative branch of the government.

The experience of Great-Britain, which presents to mankind so many political lessons, both of the monitory and exemplary kind, and which has been frequently consulted in the course of these inquiries, corroborates the result of the reflections which we

have just made. The number of inhabitants in the two kingdoms of England and Scotland, cannot be stated at less than eight millions. The representatives of these eight millions in the house of commons, amount to five hundred and fifty-eight. Of this number, one-ninth are elected by three hundred and sixty-four persons, and one half, by five thousand seven hundred and twenty-three persons*. It cannot be supposed that the half thus elected, and who do not even reside among the people at large, can add any thing either to the security of the people against the government, or to the knowledge of their circumstances and interests in the legislative councils. On the contrary, it is notorious, that they are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights. They might, therefore, with great propriety, be considered as something more than a mere deduction from the real representatives of the nation. We will, however, consider them in this light alone, and will not extend the deduction to a considerable number of others, who do not reside among their constituents, are very faintly connected with them, and have very little particular knowledge of their affairs. With all these concessions, two hundred and seventy-nine persons only will be the depository of the safety, interest, and happiness of eight millions; that is to say, there will be one representative only, to maintain the rights, and explain the situation, of *twenty-eight thousand six hundred and seventy* constituents, in an assembly exposed to the whole force of executive influence, and extending its authority

* Burgh's Political Disquisitions.

to every object of legislation within a nation, whose affairs are in the highest degree diversified and complicated. Yet it is very certain, not only that a valuable portion of freedom has been preserved under all these circumstances, but that the defects in the British code are chargeable in a very small proportion, on the ignorance of the legislature concerning the circumstances of the people. Allowing to this case the weight which is due to it; and comparing it with that of the house of representatives as above explained, it seems to give the fullest assurance, that a representative for every *thirty thousand inhabitants*, will render the latter both a safe and competent guardian of the interests which will be confided to it.

PUBLIUS.

NUMBER LVII.

BY MR. HAMILTON.

The same Subject continued, in relation to the supposed tendency of the Plan of the Convention to elevate the few above the many.

THE *third* charge against the house of representatives is, that it will be taken from that class of citizens which will have least sympathy with the mass of the people; and be most likely to aim at an ambitious sacrifice of the many, to the aggrandizement of the few.

Of all the objections which have been framed against the federal constitution, this is perhaps the most extraordinary. Whilst the objection itself is

levelled against a pretended oligarchy, the principle of it strikes at the very root of republican government.

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers, is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy, are numerous and various. The most effectual one, is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.

Let me now ask, what there is in the constitution of the house of representatives, that violates the principles of republican government; or favours the elevation of the few, on the ruins of the many? Let me ask, whether every circumstance is not, on the contrary, strictly conformable to these principles; and scrupulously impartial to the rights and pretensions of every class and description of citizens?

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same, who exercise the right in every state of electing the correspondent branch of the legislature of the state.

Who are to be the objects of popular choice?

Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment, or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow-citizens, we are to presume that, in general, they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.

In the second place, they will enter into the public service under circumstances, which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honour, of favour, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be confessed, that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires, is itself a proof of the energy and prevalence of the contrary sentiment.

In the third place, those ties which bind the representative to his constituents, are strengthened by motives of a more selfish nature. His pride and

vanity attach him to a form of government which favours his pretensions, and gives him a share in its honours and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen, that a great proportion of the men deriving their advancement from their influence with the people, would have more to hope from a preservation of their favour, than from innovations in the government subversive of the authority of the people.

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the house of representatives is so constituted, as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there for ever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it.

I will add, as a fifth circumstance in the situation of the house of representatives, restraining them from oppressive measures; that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest, and sympathy of sentiments, of which few governments have furnished examples; but without which

every government degenerates into tyranny. If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased, as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

Such will be the relation between the house of representatives and their constituents. Duty, gratitude, interest, ambition itself, are the cords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient, to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine, and the characteristic means, by which republican government provides for the liberty and happiness of the people? Are they not the identical means on which every state government in the union relies for the attainment of these important ends? What then are we to understand by the objection which this paper has combated? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who

will immediately and infallibly betray the trust committed to them?

Were the objection to be read by one, who had not seen the mode prescribed by the constitution for the choice of representatives, he could suppose nothing less, than that some unreasonable qualification of property was annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes; or at least, that the mode prescribed by the state constitutions was, in some respect or other, very grossly departed from. We have seen how far such a supposition would err, as to the two first points. Nor would it, in fact, be less erroneous as to the last. The only difference discoverable between the two cases is, that each representative of the United States will be elected by five or six thousand citizens; whilst, in the individual states, the election of a representative is left to about as many hundred. Will it be pretended, that this difference is sufficient to justify an attachment to the state governments, and an abhorrence to the federal government? If this be the point on which the objection turns, it deserves to be examined.

Is it supported by *reason?* This cannot be said, without maintaining, that five or six thousand citizens are less capable of choosing a fit representative, or more liable to be corrupted by an unfit one, than five or six hundred. Reason, on the contrary, assures us that, as in so great a number, a fit representative would be most likely to be found; so the choice would be less likely to be diverted from him, by the intrigues of the ambitious, or the bribes of the rich.

Is the *consequence* from this doctrine admissible?

If we say that five or six hundred citizens are as many as can jointly exercise their right of suffrage, must we not deprive the people of the immediate choice of their public servants in every instance, where the administration of the government does not require as many of them as will amount to one for that number of citizens?

Is the doctrine warranted by *facts?* It was shown in the last paper, that the real representation in the British house of commons, very little exceeds the proportion of one for every thirty thousand inhabitants. Besides a variety of powerful causes, not existing here, and which favour in that country the pretensions of rank and wealth, no person is eligible as a representative of a county, unless he possesses real estate of the clear value of six hundred pounds sterling per year; nor of a city or borough, unless he possesses a like estate of half that annual value. To this qualification, on the part of the county representatives, is added another on the part of the county electors, which restrains the right of suffrage to persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money. Notwithstanding these unfavourable circumstances, and notwithstanding some very unequal laws in the British code, it cannot be said, that the representatives of the nation have elevated the few, on the ruins of the many.

But we need not resort to foreign experience on this subject. Our own is explicit and decisive. The districts in New-Hampshire, in which the senators are chosen immediately by the people, are nearly as large as will be necessary for her representatives in the congress. These of Massachusetts are larger

than will be necessary for that purpose. And those of New-York still more so. In the last state, the members of assembly, for the cities and counties of New-York and Albany, are elected by very nearly as many voters as will be entitled to a representative in the congress, calculating on the number of sixty-five representatives only. It makes no difference, that in these senatorial districts and counties, a number of representatives are voted for by each elector at the same time. If the same electors, at the same time, are capable of choosing four or five representatives, they cannot be incapable of choosing one. Pennsylvania is an additional example. Some of her counties, which elect her state representatives, are almost as large as her districts will be by which her federal representatives will be elected. The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will, therefore, form nearly two districts for the choice of federal representatives. It forms, however, but one county, in which every elector votes for each of its representatives in the state legislature. And what may appear to be still more directly to our purpose, the whole city actually elects a *single member* for the executive council. This is the case in all the other counties of the state.

Are not these facts the most satisfactory proofs of the fallacy, which has been employed against the branch of the federal government under consideration? Has it appeared on trial, that the senators of New-Hampshire, Massachusetts, and New York; or the executive council of Pennsylvania; or the members of the assembly in the two last states, have betrayed any peculiar disposition to sacrifice the many to the few; or are in any respect less worthy of their

places, than the representatives and magistrates appointed in other states, by very small divisions of the people?

But there are cases of a stronger complexion, than any which I have yet quoted. One branch of the legislature of Connecticut is so constituted, that each member of it is elected by the whole state. So is the governor of that state, of Massachusetts, and of this state, and the president of New-Hampshire. I leave every man to decide, whether the result of any one of these experiments can be said to countenance a suspicion, that a diffusive mode of choosing representatives of the people tends to elevate traitors, and to undermine the public liberty.

PUBLIUS.

NUMBER LVIII.

BY MR. HAMILTON.

The same Subject continued, in relation to the future augmentation of the Members.

THE remaining charge against the house of representatives, which I am to examine, is grounded on a supposition that the number of members will not be augmented from time to time, as the progress of population may demand.

It has been admitted that this objection, if well supported, would have great weight. The following observations will show, that, like most other objections against the constitution, it can only proceed from a partial view of the subject; or from a jealousy

which discolours and disfigures every object which it beholds.

1. Those who urge the objection, seem not to have recollected, that the federal constitution will not suffer by a comparison with the state constitutions, in the security provided for a gradual augmentation of the number of representatives. The number which is to prevail in the first instance, is declared to be temporary. Its duration is limited to the short term of three years.

Within every successive term of ten years, a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to re-adjust, from time to time, the apportionment of representatives to the number of inhabitants; under the single exception, that each state shall have one representative at least: Secondly, to augment the number of representatives at the same periods; under the sole limitation, that the whole number shall not exceed one for every thirty thousand inhabitants. If we review the constitutions of the several states, we shall find that some of them contain no determinate regulations on this subject; that others correspond pretty much on this point with the federal constitution; and that the most effectual security in any of them, is resolvable into a mere directory provision.

2. As far as experience has taken place on this subject, a gradual increase of representatives under the state constitutions, has at least kept pace with that of the constituents; and it appears that the former have been as ready to concur in such measures, as the latter have been to call for them.

3. There is a peculiarity in the federal constitution, which ensures a watchful attention in a majority both of the people and of their representatives,

to a constitutional augmentation of the latter. The peculiarity lies in this, that one branch of the legislature is a representation of citizens; the other of the states: In the former, consequently, the larger states will have most weight; in the latter, the advantage will be in favour of the smaller states. From this circumstance it may with certainty be inferred, that the larger states will be strenuous advocates for increasing the number and weight of that part of the legislature in which their influence predominates. And it so happens, that four only of the largest will have a majority of the whole votes in the house of representatives. Should the representatives or people, therefore, of the smaller states, oppose at any time a reasonable addition of members, a coalition of a very few states will be sufficient to over-rule the opposition; a coalition which, notwithstanding the rivalship and local prejudices which might prevent it on ordinary occasions, would not fail to take place, when not merely prompted by common interest, but justified by equity and the principles of the constitution.

It may be alleged, perhaps, that the senate would be prompted by like motives to an adverse coalition; and as their concurrence would be indispensable, the just and constitutional views of the other branch might be defeated. This is the difficulty which has probably created the most serious apprehensions in the jealous friends of a numerous representation.—Fortunately it is among the difficulties which, existing only in appearance, vanish on a close and accurate inspection. The following reflections will, if I mistake not, be admitted to be conclusive and satisfactory on this point.

Notwithstanding the equal authority which will subsist between the two houses on all legislative subjects, except the originating of money-bills, it cannot be doubted, that the house composed of the greater numbers, when supported by the more powerful states, and speaking the known and determined sense of a majority of the people, will have no small advantage in a question depending on the comparative firmness of the two houses.

This advantage must be increased by the consciousness felt by the same side, of being supported in its demands, by right, by reason, and by the constitution; and the consciousness on the opposite side, of contending against the force of all these solemn considerations.

It is further to be considered, that in the gradation between the smallest and largest states, there are several which, though most likely in general to arrange themselves among the former, are too little removed in extent and population from the latter, to second an opposition to their just and legitimate pretensions. Hence it is by no means certain, that a majority of votes, even in the senate, would be unfriendly to proper augmentations in the number of representatives.

It will not be looking too far to add, that the senators from all the new states may be gained over to the just views of the house of representatives, by an expedient too obvious to be overlooked. As these states will, for a great length of time, advance in population with peculiar rapidity, they will be interested in frequent re-apportionments of the representatives to the number of inhabitants. The large states, therefore, who will prevail in the house of representatives, will have nothing to do, but to make

re-apportionments and augmentations mutually conditions of each other; and the senators from all the most growing states will be bound to contend for the latter, by the interest which their states will feel in the former.

These considerations seem to afford ample security on this subject; and ought alone to satisfy all the doubts and fears which have been indulged with regard to it. Admitting, however, that they should all be insufficient to subdue the unjust policy of the smaller states, or their predominant influence in the councils of the senate; a constitutional and infallible resource still remains with the larger states, by which they will be able at all times to accomplish their just purposes. The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse; that powerful instrument by which we behold in the history of the British constitution an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

But will not the house of representatives be as much interested as the senate, in maintaining the government in its proper functions, and will they not therefore be unwilling to stake its existence or its reputation on the pliancy of the senate? Or if such a trial of firmness between the two branches

were hazarded, would not the one be as likely first to yield as the other? These questions will create no difficulty with those who reflect, that in all cases, the smaller the number, and the more permanent and conspicuous the station of men in power, the stronger must be the interest which they will individually feel in whatever concerns the government. Those who represent the dignity of their country in the eyes of other nations, will be particularly sensible to every prospect of public danger, or of a dishonourable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British house of commons over the other branches of the government, whenever the engine of a money-bill has been employed. An absolute inflexibility on the side of the latter, although it could not have failed to involve every department of the state in the general confusion, has neither been apprehended nor experienced. The utmost degree of firmness that can be displayed by the federal senate or president, will not be more than equal to a resistance, in which they will be supported by constitutional and patriotic principles.

In this review of the constitution of the house of representatives, I have passed over the circumstance of economy, which, in the present state of affairs, might have had some effect in lessening the temporary number of representatives; and a disregard of which would probably have been as rich a theme of declamation against the constitution, as has been furnished by the smallness of the number proposed. I omit also any remarks on the difficulty which might be found, under present circumstances, in engaging in the federal service a larger number of such characters as the people will probably elect. One obser-

vation, however, I must be permitted to add on this subject, as claiming, in my judgment, a very serious attention. It is, that in all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendency of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now it is precisely on characters of this description, that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway, as if a sceptre had been placed in his single hands. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning; and passion the slave of sophistry and declamation. The people can never err more than in supposing, that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will for ever admonish them, that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society*, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic; but the soul that animates it will be more oligarchic. The ma-

chine will be enlarged, but the fewer, and often the more secret, will be the springs by which is motions are directed.

As connected with the objection against the number of representatives, may properly be here noticed, that which has been suggested against the number made competent for legislative business. It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision.

That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice, or the general good, might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences. Lastly, it would facilitate and foster the baneful practice of secessions; a practice which has shown itself, even in states where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsions, and the ruin of popular governments, than any other which has yet been displayed among us. PUBLIUS.

NUMBER LIX.

BY MR. HAMILTON.

Concerning the Regulation of Elections.

THE natural order of the subject leads us to consider, in this place, that provision of the constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members.

It is in these words: "The *times*, *places*, and *manner* of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may, at any time, by law, make or alter *such regulations*, except as to *places* of choosing senators*." This provision has not only been declaimed against by those who condemn the constitution in the gross; but it has been censured by those who have objected with less latitude, and greater moderation; and, in one instance, it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.

I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.* Every just reasoner will, at first sight, approve an adherence to this rule in the work of the convention; and will disapprove every deviation from it, which may not appear to have been dictated by the necessity of incorporating into the

* 1st Clause, 4th Section of the 1st Article.

work some particular ingredient, with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard a departure from so fundamental a principle, as a portion of imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.

It will not be alleged, that an election law could have been framed and inserted in the constitution, which would have been applicable to every probable change in the situation of the country; and it will, therefore, not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably organized; that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter, and ultimately in the former. The last mode has with reason been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the state legislatures, would leave the existence of the union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice

of persons to administer its affairs. It is to little purpose to say, that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy, can never be dignified with that character. If we are in a humour to presume abuses of power, it is as fair to presume them on the part of the state governments, as on the part of the general government. And as it is more consonant to the rules of a just theory, to intrust the union with the care of its own existence, than to transfer that care to any other hands; if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed.

Suppose an article had been introduced into the constitution, empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle, in this case, would have required no comment; and, to an unbiassed observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the state governments. An impartial view of the matter cannot fail to result in a conviction, that each as far as possible, ought to depend on itself for its own preservation.

As an objection to this position, it may be remarked, that the constitution of the national senate, would involve in its full extent the danger which it is suggested might flow from an exclusive power in the state legislatures to regulate the federal elections. It may be alleged, that by declining the appointment of senators, they might at any time give a fatal blow to the union; and from this it may be inferred, that as its existence would be thus rendered dependent upon them in so essential a point, there can be no objection to intrusting them with it, in the particular case under consideration. The interest of each state, it may be added, to maintain its representation in the national councils, would be a complete security against an abuse of the trust.

This argument, though specious, will not, upon examination, be found solid. It is certainly true, that the state legislatures, by forbearing the appointment of senators, may destroy the national government. But it will not follow, that because they have the power to do this in one instance, they ought to have it in every other. There are cases in which the pernicious tendency of such a power may be far more decisive, without any motive to recommend their admission into the system, equally cogent with that which must have regulated the conduct of the convention, in respect to the formation of the senate. So far as that mode of formation may expose the union to the possibility of injury from the state legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the states, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of

the federal principle; and would certainly have deprived the state governments of that absolute safeguard, which they will enjoy under this provision. But, however wise it may have been, to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage or a greater good, no inference can be drawn from thence to favour an accumulation of the evil, where no necessity urges, nor any greater good invites.

It may also be easily discerned, that the national government would run a much greater risk, from a power in the state legislatures over the elections of its house of representatives, than from their power of appointing the members of its senate. The senators are to be chosen for the period of six years; there is to be a rotation, by which the seats of a third part of them are to be vacated, and replenished every two years; and no state is to be entitled to more than two senators: A quorum of the body is to consist of sixteen members. The joint result of these circumstances would be, that a temporary combination of a few states, to intermit the appointment of senators, could neither annul the existence, nor impair the activity of the body: And it is not from a general and permanent combination of the states, that we can have any thing to fear. The first might proceed from sinister designs in the leading members of a few of the state legislatures; the last would suppose a fixed and rooted disaffection in the great body of the people; which will either never exist at all, or will in all probability, proceed from an experience of the inaptitude of the general government to the advancement of their happiness; in which event, no good citizen could desire its continuance.

But with regard to the federal house of representatives, there is intended to be a general election of members once in two years. If the state legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation; which might issue in a dissolution of the union, if the leaders of a few of the most important states should have entered into a previous conspiracy to prevent an election.

I shall not deny that there is a degree of weight in the observation, that the interest of each state to be represented in the federal councils, will be a security against the abuse of a power over its elections in the hands of the state legislatures. But the security will not be considered as complete, by those who attend to the force of an obvious distinction between the interests of the people in the public felicity, and the interest of their local rulers in the power and consequence of their offices. The people of America may be warmly attached to the government of the union, at times when the particular rulers of particular states, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those states, may be in a very opposite temper. This diversity of sentiment between a majority of the people, and the individuals who have the greatest credit in their councils, is exemplified in some of the states at the present moment, on the present question.—The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the state administrations, as are capable of preferring their own emolument and advancement to the public

weal. With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men, in a few of the most considerable states, where the temptation will always be the strongest, might accomplish the destruction of the union; by seizing the opportunity of some casual dissatisfaction among the people, and which perhaps they may themselves have excited, to discontinue the choice of members for the federal house of representatives. It ought never to be forgotten, that a firm union of this country, under an efficient government, will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers, and will seldom fail to be patronized and abetted by some of them. Its preservation therefore ought in no case, that can be avoided, to be committed to the guardianship of any but those, whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.

PUBLIUS.

NUMBER LX.

BY MR. HAMILTON.

The same Subject continued.

WE have seen, that an uncontrollable power over the elections for the federal government could not, without hazard, be committed to the state legislatures. Let us now see what are the dangers on the

other side; that is, from confiding the ultimate right of regulating its own elections to the union itself. It is not pretended that this right would ever be used for the exclusion of any state from its share in the representation. The interest of all would, in this respect at least, be the security of all. But it is alleged, that it might be employed in such a manner as to promote the election of some favourite class of men in exclusion of others; by confining the places of election to particular districts, and rendering it impracticable for the citizens at large to partake in the choice. Of all chimerical suppositions, this seems to be the most chimerical. On the one hand, no rational calculation of probabilities would lead us to imagine, that the disposition which a conduct so violent and extraordinary would imply, could ever find its way into the national councils; and on the other hand, it may be concluded with certainty, that if so improper a spirit should ever gain admittance into them, it would display itself in a form altogether different, and far more decisive.

The improbability of the attempt may be satisfactorily inferred from this single reflection, that it could never be made without causing an immediate revolt of the great body of the people, headed and directed by the state governments. It is not difficult to conceive, that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated in respect to a particular class of citizens by a victorious majority; but that so fundamental a privilege, in a country situated and enlightened as this is, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the government, without occasioning a popular revolution, is altogether inconceivable and incredible.

In addition to this general reflection, there are considerations of a more precise nature, which forbid all apprehension on the subject. The dissimilarity in the ingredients, which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views, in any partial scheme of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society. And though an intimate intercourse under the same government, will promote a gradual assimilation of temper and sentiment, yet there are causes, as well physical as moral, which may, in a greater or less degree, permanently nourish different propensities and inclinations in this particular. But the circumstance which will be likely to have the greatest influence in the matter, will be the dissimilar modes of constituting the several component parts of the government. The house of representatives being to be elected immediately by the people; the senate by the state legislatures; the president by electors chosen for that purpose by the people; there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

As to the senate, it is impossible that any regulation of "time and manner," which is all that is proposed to be submitted to the national government in respect to that body, can affect the spirit which will direct the choice of its members. The collective sense of the state legislatures, can never be influenced by

extraneous circumstances of that sort: a consideration which alone ought to satisfy us that the discrimination apprehended would never be attempted. For what inducement could the senate have to concur in a preference in which itself would not be included? Or to what purpose would it be established in reference to one branch of the legislature, if it could not be extended to the other? The composition of the one would in this case counteract that of the other. And we can never suppose that it would embrace the appointments to the senate, unless we can at the same time suppose the voluntary co-operation of the state legislatures. If we make the latter supposition, it then becomes immaterial where the power in question is placed; whether in their hands, or in those of the union.

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favour of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest? Or, to speak in the fashionable language of the adversaries of the constitution, will it court the elevation of the "wealthy "and the well-born," to the exclusion and debasement of all the rest of the society?

If this partiality is to be exerted in favour of those, who are concerned in any particular description of industry or property, I presume it will readily be admitted, that the competition for it will lie between landed men and merchants. And I scruple not to affirm, that it is infinitely less likely that either of them should gain an ascendant in the national coun-

cils, than that the one or the other of them should predominate in all the local councils. The inference will be, that a conduct tending to give an undue preference to either, is much less to be dreaded from the former than from the latter.

The several states are in various degrees addicted to agriculture and commerce. In most, if not all of them, the first is predominant. In a few of them, however, the latter nearly divides its empire; and in most of them has a considerable share of influence. In proportion as either prevails, it will be conveyed into the national representation; and for the very reason, that this will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single state, it will be much less apt to espouse either of them with a decided partiality, than the representation of any single state.

In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government. As long as this interest prevails in most of the state legislatures, so long it must maintain a correspondent superiority in the national senate, which will generally be a faithful copy of the majorities of those assemblies. It cannot therefore be presumed, that a sacrifice of the landed to the mercantile class, will ever be a favourite object of this branch of the federal legislature. In applying thus particularly to the senate a general observation suggested by the situation of the country, I am governed by the consideration, that the credulous votaries of state power cannot, upon their own principles, suspect that the state legislatures would be warped from their duty by any external in-

fluence. But as in reality the same situation must have the same effect, in the primitive composition at least of the federal house of representatives; an improper bias towards the mercantile class, is as little to be expected from this quarter or from the other.

In order perhaps to give countenance to the objection at any rate, it may be asked, is there not danger of an opposite bias in the national government, which may produce an endeavour to secure a monopoly of the federal administration to the landed class? As there is little likelihood that the supposition of such a bias will have any terrors for those who would be immediately injured by it, a laboured answer to this question will be dispensed with. It will be sufficient to remark, first, that for the reasons elsewhere assigned, it is less likely that any decided partiality should prevail in the councils of the union, than in those of any of its members. Secondly, that there would be no temptation to violate the constitution in favour of the landed class, because that class would, in the natural course of things, enjoy as great a preponderancy as itself could desire. And thirdly, that men accustomed to investigate the sources of public prosperity, upon a large scale, must be too well convinced of the utility of commerce, to be inclined to inflict upon it so deep a wound, as would be occasioned by the entire exclusion of those who would best understand its interests, from a share in the management of them. The importance of commerce in the view of revenue alone, must effectually guard it against the enmity of a body, which would be continually importuned in its favour, by the urgent calls of public necessity.

I the rather consult brevity in discussing the probability of a preference founded upon a discrimina-

tion between the different kinds of industry and property, because, as far as I understand the meaning of the objectors, they contemplate a discrimination of another kind. They appear to have in view, as the objects of the preference with which they endeavour to alarm us, those whom they designate by the description of the "wealthy and the well-born." These, it seems, are to be exalted to an odious pre-eminence over the rest of their fellow-citizens. At one time, however, their elevation is to be a necessary consequence of the smallness of the representative body; at another time, it is to be effected by depriving the people at large of the opportunity of exercising their right of suffrage in the choice of that body.

But upon what principle is the discrimination of the places of election to be made, in order to answer the purpose of the meditated preference? Are the wealthy and the well-born, as they are called, confined to particular spots in the several states? Have they, by some miraculous instinct or foresight set apart in each of them, a common place of residence? Are they only to be met with in the towns and the cities? Or are they, on the contrary, scattered over the face of the country, as avarice or chance may have happened to cast their own lot, or that of their predecessors? If the latter is the case, (as every intelligent man knows it to be*,) is it not evident that the policy of confining the places of elections to particular districts, would be as subversive of its own aim, as it would be exceptionable on every other account? The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected.

* Particularly in the southern states and in this state.

But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature.

Let it however be admitted, for argument sake, that the expedient suggested might be successful; and let it at the same time be equally taken for granted, that all the scruples which a sense of duty, or an apprehension of the danger of the experiment might inspire, were overcome in the breasts of the national rulers; still, I imagine, it will hardly be pretended, that they could ever hope to carry such an enterprise into execution, without the aid of a military force sufficient to subdue the resistance of the great body of the people. The improbability of the existence of a force equal to that object, has been discussed and demonstrated in different parts of these papers; but that the futility of the objection under consideration may appear in the strongest light, it shall be conceded for a moment, that such a force might exist; and the national government shall be supposed to be in the actual possession of it. What will be the conclusion? With a disposition to invade the essential rights of the community, and with the means of gratifying that disposition, is it presumable that the persons who were actuated by it would amuse themselves in the ridiculous task of fabricating election laws for securing a preference to a favourite class of men? Would they not be likely to prefer a conduct better adapted to their own immediate aggrandizement? Would they not

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rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation, than to trust to precarious expedients, which, in spite of all the precautions that might accompany them, might terminate in the dismission, disgrace, and ruin of their authors? Would they not fear that citizens not less tenacious than conscious of their rights, would flock from the remotest extremes of their respective states to the places of election, to overthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people?

PUBLIUS.

NUMBER LXI.

BY MR. HAMILTON.

The same Subject continued, and concluded.

THE more candid opposers of the provision, contained in the plan of the convention, respecting elections, when pressed in argument, will sometimes concede the propriety of it; with this qualification, however, that it ought to have been accompanied with a declaration, that all elections should be held in the counties where the electors reside. This, say they, was a necessary precaution against an abuse of the power. A declaration of this nature, would certainly have been harmless: So far as it would have had the effect of quieting apprehensions, it might not have been undesirable. But it would, in fact, have afforded little or no additional security against the danger apprehended; and the want of it will

never be considered, by an impartial and judicious examiner, as a serious, still less as an insuperable objection to the plan. The different views taken of the subject in the two preceding papers, must be sufficient to satisfy all dispassionate and discerning men, that if the public liberty should ever be the victim of the ambition of the national rulers, the power under examination, at least, will be guiltless of the sacrifice.

If those who are inclined to consult their jealousy only, would exercise it in a careful inspection of the several state constitutions, they would find little less room for disquietude and alarm, from the latitude which most of them allow in respect to elections, than from that which is proposed to be allowed to the national government in the same respect. A review of their situation, in this particular, would tend greatly to remove any ill impressions which may remain in regard to this matter. But, as that review would lead into long and tedious details, I shall content myself with the single example of the state in which I write. The constitution of New-York makes no other provision for locality of elections, than that the members of the assembly shall be elected in the *counties;* those of the senate, in the great districts into which the state is, or may be divided: these at present are four in number, and comprehend each from two to six counties. It may readily be perceived, that it would not be more difficult for the legislature of New-York to defeat the suffrages of the citizens of New-York, by confining elections to particular places, than for the legislature of the United States to defeat the suffrages of the citizens of the union, by the like expedient. Suppose, for instance, the city of Albany was to be appoint-

ed the sole place of election for the county and district of which it is a part, would not the inhabitants of that city speedily become the only electors of the members both of the senate and assembly for that county and district? Can we imagine, that the electors who reside in the remote subdivisions of the counties of Albany, Saratoga, Cambridge, &c. or in any part of the county of Montgomery, would take the trouble to come to the city of Albany, to give their votes for members of the assembly or senate, sooner than they would repair to the city of New-York, to participate in the choice of the members of the federal house of representatives? The alarming indifference discoverable in the exercise of so invaluable a privilege under the existing laws, which afford every facility to it, furnishes a ready answer to this question. And, abstracted from any experience on the subject, we can be at no loss to determine, that when the place of election is at an *inconvenient distance* from the elector, the effect upon his conduct will be the same, whether that distance be twenty miles, or twenty thousand miles. Hence it must appear, that objections to the particular modification of the federal power of regulating elections, will, in substance, apply with equal force to the modification of the like power in the constitution of this state; and for this reason it will be impossible to acquit the one, and to condemn the other. A similar comparison would lead to the same conclusion, in respect to the constitutions of most of the other states.

If it should be said, that defects in the state constitutions furnish no apology for those which are to be found in the plan proposed; I answer, that as the former have never been thought chargeable with inattention to the security of liberty, where the impu-

tations thrown on the latter can be shown to be applicable to them also, the presumption is, that they are rather the cavilling refinements of a predetermined opposition, than the well-founded inferences of a candid research after truth. To those who are disposed to consider as innocent omissions in the state constitutions, what they regard as unpardonable blemishes in the plan of the convention, nothing can be said; or, at most, they can only be asked to assign some substantial reason why the representatives of the people, in a single state, should be more impregnable to the lust of power, or other sinister motives, than the representatives of the people of the United States? If they cannot do this, they ought, at least, to prove to us, that it is easier to subvert the liberties of three millions of people, with the advantage of local governments to head their opposition, than of two hundred thousand people who are destitute of that advantage. And in relation to the point immediately under consideration, they ought to convince us that it is less probable that a predominant faction, in a single state, should, in order to maintain its superiority, incline to a preference of a particular class of electors, than that a similar spirit should take possession of the representatives of thirteen states, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests.

Hitherto my observations have only aimed at a vindication of the provision in question, on the ground of theoretic propriety, on that of the danger of placing the power elsewhere, and on that of the safety of placing it in the manner proposed. But there remains to be mentioned a positive advantage

which will accrue from this disposition, and which could not as well have been obtained from any other: I allude to the circumstance of uniformity, in the time of elections for the federal house of representatives. It is more than possible, that this uniformity may be found by experience, to be of great importance to the public welfare; both as a security against the perpetuation of the same spirit in the body, and as a cure for the diseases of faction. If each state may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year. The times of election in the several states, as they are now established for local purposes, vary between extremes as wide as March and November. The consequence of this diversity would be, that there could never happen a total dissolution or renovation of the body at one time. If an improper spirit of any kind should happen to prevail in it, that spirit would be apt to infuse itself into the new members, as they come forward in succession. The mass would be likely to remain nearly the same; assimilating constantly to itself its gradual accretions. There is a contagion in example which few men have sufficient force of mind to resist. I am inclined to think, that treble the duration in office, with the condition of a total dissolution of the body at the same time, might be less formidable to liberty, than one third of that duration, subject to gradual and successive alterations.

Uniformity, in the time of elections, seems not less requisite for executing the idea of a regular rotation in the senate; and for conveniently assembling the legislature at a stated period in each year.

It may be asked, why then could not a time have

been fixed in the constitution? As the most zealous adversaries of the plan of the convention in this state, are in general not less zealous admirers of the constitution of the state, the question may be retorted, and it may be asked, why was not a time for the like purpose fixed in the constitution of this state? No better answer can be given, than that it was a matter which might safely be intrusted to legislative discretion; and that, if a time had been appointed, it might, upon experiment, have been found less convenient than some other time. The same answer may be given to the question put on the other side. And it may be added, that the supposed danger of a gradual change being merely speculative, it would have been hardly advisable upon that speculation to establish, as a fundamental point, what would deprive several states of the convenience of having the elections for their own governments, and for the national government, at the same epoch.

PUBLIUS.

NUMBER LXII.

BY MR. HAMILTON.

Concerning the Constitution of the Senate, with regard to the qualifications of the Members; the manner of appointing them; the equality of representation; the number of the Senators, and the duration of their appointments.

HAVING examined the constitution of the house of representatives, and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the senate.

The heads under which this member of the government may be considered, are—I. The qualifications of senators—II. The appointment of them by the state legislatures—III. The equality of representation in the senate—IV. The number of senators, and the term for which they are to be elected—V. The powers vested in the senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age, and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust; which, requiring greater extent of information and stability of character, requires at the same time, that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence; and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the state legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the conven-

tion is probably the most congenial with the public opinion. It is recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former, and may form a convenient link between the two systems.

III. The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government: and that among independent and sovereign states bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former, lies between the proposed govern-

ment, and a government still more objectionable. Under this alternative, the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked, that the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic.

Another advantage accruing from this ingredient in the constitution of the senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the states. It must be acknowledged, that this complicated check on legislation may, in some instances, be injurious as well as beneficial; and that the peculiar defence which it involves in favour of the smaller states, would be more rational, if any interests common to them, and distinct from those of the other states, would otherwise be exposed to peculiar danger. But as the larger states will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser states; and as the facility and excess of law-making seem to be the diseases to which our governments are most li-

able, it is not impossible, that this part of the constitution may be more convenient in practice, than it appears to many in contemplation.

IV. The number of senators, and the duration of their appointment, come next to be considered. In order to form an accurate judgment on both these points, it will be proper to inquire into the purposes which are to be answered by the senate; and, in order to ascertain these, it will be necessary to review the inconveniencies which a republic must suffer from the want of such an institution.

First. It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that, as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

Second. The necessity of a senate is not less indi-

cated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted, need not be proved. All that need be remarked is, that a body which is to correct this infirmity, ought itself to be free from it, and consequently ought to be less numerous. It ought moreover to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Third. Another defect to be supplied by a senate, lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men, called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads, rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding session; so many

admonitions to the people, of the value of those aids, which may be expected from a well constituted senate?

A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities: Most governments are deficient in the first. I scruple not to assert, that, in the American governments, too little attention has been paid to the last. The federal constitution avoids this error: and what merits particular notice, it provides for the last in a mode which increases the security for the first.

Fourth. The mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the states, is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

To trace the mischievous effects of a mutable government, would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place, it forfeits the respect and confidence of other nations, and all the advantages con-

nected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbours may pity him, but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another, what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage of the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of its wiser neighbours. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood: if they be repealed or revised before they are promulged, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of

action; but how can that be a rule, which is little known and less fixed?

Another effect of public instability, is the unreasonable advantage it gives to the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth, that laws are made for the *few*, not for the *many*.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils, damps every useful undertaking; the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce, when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer, will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance, that his preparatory labours and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward, which requires the auspices of a steady system of national policy.

But the most deplorable effect of all, is that diminution of attachment and reverence, which steals into the hearts of the people, towards a political sys-

tem which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected, without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.

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NUMBER LXIII.

BY MR. HAMILTON.

A further View of the Constitution of the Senate, in regard to the duration of the appointment of its Members.

A FIFTH desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned; but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

An attention to the judgment of other nations, is important to every government, for two reasons: The one is, that, independently of the merits of any particular plan or measure, it is desirable on various accounts, that it should appear to other nations as the offspring of a wise and honourable policy: The second is, that in doubtful cases, particularly where the national councils may be warped by some strong

passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed. What has not America lost with foreign nations by her want of character? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiassed part of mankind.

Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small, that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode-Island, would probably have been little affected in their deliberations on the iniquitous measures of that state, by arguments drawn from the light in which such measures would be viewed by foreign nations, or even by the sister states; whilst it can scarcely be doubted, that if the concurrence of a select and stable body had been necessary, a regard to national character alone, would have prevented the calamities under which that misguided people is now labouring.

I add, as a *sixth* defect, the want in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections, which in other cases produces this responsibility. The remark will, perhaps, appear not only new, but paradoxical. It must nevertheless be acknow-

ledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party; and in order to be effectual, must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents.—The objects of government may be divided into two general classes; the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident, that an assembly elected for so short a term, as to be unable to provide more than one or two links in a chain of measures on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements, which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the *share* of influence, which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult, at any rate, to preserve a personal responsibility in the members of a *numerous* body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents.

The proper remedy for this defect, must be an additional body in the legislative department, which, having sufficient permanency to provide for such ob-

jects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well-constructed senate, only as they relate to the representatives of the people. To a people as little blinded by prejudice, or corrupted by flattery, as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary, as a defence to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth, can regain their authority over the public mind? What bitter anguish would not the people of Athens have often avoided, if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing, to the same citizens, the hemlock on one day, and statues on the next.

It may be suggested, that a people spread over an extensive region, cannot, like the crowded inha-

bitants of a small district, be subject to the infection of violent passions; or to the danger of combining in the pursuit of unjust measures. I am far from denying, that this is a distinction of peculiar importance. I have, on the contrary, endeavoured in a former paper to show, that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered, as superseding the use of auxiliary precautions. It may even be remarked, that the same extended situation, which will exempt the people of America from some of the dangers incident to lesser republics, will expose them to the inconveniency of remaining for a longer time, under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them.

It adds no small weight to all these considerations, to recollect, that history informs us of no long-lived republic, which had not a senate. Sparta, Rome, and Carthage, are in fact the only states to whom that character can be applied. In each of the two first, there was a senate for life. The constitution of the senate in the last, is less known. Circumstantial evidence makes it probable, that it was not different in this particular from the two others. It is at least certain, that it had some quality or other, which rendered it an anchor against popular fluctuations, and that a smaller council, drawn out of the senate, was appointed not only for life, but filled up vacancies itself. These examples, though as unfit for the imitation as they are repugnant to the genius of America, are, notwithstanding, when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of

the necessity of some institution, that will blend stability with liberty. I am not unaware of the circumstances which distinguish the American from other popular governments, as well ancient as modern; and which render extreme circumspection necessary, in reasoning from the one case to the other. But after allowing due weight to this consideration, it may still be maintained, that there are many points of similitude, which render these examples not unworthy of our attention. Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves. There are others peculiar to the former, which require the control of such an institution. The people can never wilfully betray their own interests: but they may possibly be betrayed by their representatives; and the danger will be evidently greater, where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.

The difference most relied on between the American and other republics, consists in the principle of representation, which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them. The use which has been made of this difference, in reasonings contained in former papers, will have shown that I am disposed neither to deny its existence, nor to undervalue its importance. I feel the less restraint therefore in observing, that the position concerning the ignorance of the ancient governments on the subject of representation, is by

no means precisely true, in the latitude commonly given to it. Without entering into a disquisition which would here be misplaced, I will refer to a few known facts in support of what I advance.

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and *representing* them in their *executive* capacity.

Prior to the reform of Solon, Athens was governed by nine archons, annually *elected by the people at large.* The degree of power delegated to them, seems to be left in great obscurity. Subsequent to that period we find an assembly, first of four, and afterwards of six hundred members, annually *elected by the people;* and *partially* representing them in their *legislative* capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people. The senate of Carthage, also, whatever might be its power, or the duration of its appointment, appears to have been elective by the suffrages of the people. Similar instances might be traced in most, if not all the popular governments of antiquity.

Lastly, in Sparta we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in number, but annually *elected by the whole body of the people*, and considered as the *representatives* of the people, almost in their *plenipotentiary* capacity. The Cosmi of Crete were also annually *elected by the people;* and have been considered by some authors as an institution analagous to those of Sparta and Rome, with this difference only, that in the elec-

tion of that representative body, the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, it is clear, that the principle of representation was neither unknown to the ancients, nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies *in the total exclusion of the people in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favour of the United States. But to ensure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed that any form of representative government, could have succeeded within the narrow limits occupied by the democracies of Greece.

In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the constitution will probably content himself with repeating, that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy.

To this general answer, the general reply ought to be sufficient; that liberty may be endangered by the abuses of liberty, as well as by the abuses of power; that there are numerous instances of the former, as well as of the latter; and that the former, rather than the latter, is apparently most to be ap-

prehended by the United States. But a more particular reply may be given.

Before such a revolution can be effected, the senate, it is to be observed, must in the first place, corrupt itself; must next corrupt the state legislatures; must then corrupt the house of representatives; and must finally corrupt the people at large. It is evident, that the senate must be first corrupted, before it can attempt an establishment of tyranny. Without corrupting the legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the house of representatives, the opposition of that co-equal branch of the government, would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself, that the proposed senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition, through all these obstructions?

If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland, furnishes the most apposite example. The senate of that state is elected, as the federal senate will be, indirectly by the people; and for a term less by one year only, than the federal senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment; and, at the same time, is not under the control of any such rotation as is provided for the federal senate. There are some other lesser distinctions, which would expose the former to co-

lourable objections, that do not lie against the latter. If the federal senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any state in the union.

But if any thing could silence the jealousies on this subject, it ought to be the British example. The senate there, instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The house of representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years; and in a very great proportion, by a very small proportion of the people. Here, unquestionably, ought to be seen in full display, the aristocratic usurpations and tyranny, which are at some future period to be exemplified in the United States. Unfortunately, however, for the anti-federal argument, the British history informs us, that this hereditary assembly has not even been able to defend itself against the continual encroachments of the house of representatives; and that it no sooner lost the support of the monarch, than it was actually crushed by the weight of the popular branch.

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta the Ephori, the annual representatives of the people, were found an overmatch for the senate for life; continually gained on its authority, and finally drew all power into their own hands. The tribunes of Rome, who were the representatives of the people prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. This fact is the more remarkable, as unanimity was required in every act of the tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government, which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had, at the commencement of the second punic war, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts, that the federal senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body; we are warranted in believing, that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the house of representatives, with the people on their side, will at all times be able to bring back the constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the senate, but such a display of enlightened policy, and attachment to the public

good, as will divide with that branch of the legislature, the affections and support of the entire body of the people themselves.

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NUMBER LXIV.

BY MR. HAMILTON.

A further view of the Constitution of the Senate, in regard to the power of making Treaties.

IT is a just, and not a new observation, that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either, as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed constitution in the aggregate, and treat with severity some of the most unexceptionable articles in it.

The 2d section gives power to the president, "*by* "*and with the advice and consent of the senate, to make* "*treaties*, PROVIDED TWO THIRDS OF THE SENATORS "PRESENT CONCUR."

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security, that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good. The convention appear to have been attentive to both these

points—they have directed the president to be chosen by select bodies of electors, to be deputed by the people for that express purpose; and they have committed the appointment of senators to the state legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, the hopes, and fears of the unwary and interested, often places men in office, by the votes of a small proportion of the electors.

As the select assemblies for choosing the president, as well as the state legislatures who appoint the senators, will, in general, be composed of the most enlightened and respectable citizens, there is reason to presume, that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the elections to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived, by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded, that wise kings will always be served by able ministers, it is fair to argue that, as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment. The inference which

naturally results from these considerations is this, that the president and senators so chosen, will always be of the number of those who best understand our national interests, whether considered in relation to the several states, or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men, the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs, has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them. The duration prescribed, is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country. Nor has the convention discovered less prudence in

providing for the frequent elections of senators in such a way, as to obviate the inconvenience of periodically transferring those great affairs entirely to new men—for, by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.

There are few who will not admit, that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained, and they who assent to the truth of this position, will see and confess that it is well provided for, by making the concurrence of the senate necessary, both to treaties and to laws.

It seldom happens in the negociation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons, whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the president must, in forming them, act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them; tides, very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favourable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered, from the want of secrecy and dispatch, that the constitution would have been inexcusably defective, if no attention had been paid to those objects. The matters which in negociations usually require the most secrecy, and the most dispatch, are those preparatory and auxiliary measures, which are no otherwise important in a national view, than as they tend to facilitate the attainment of the main objects. For these the president will find no difficulty to provide; and should any circumstance occur, which requires the advice and consent of the senate, he may at any time convene them. Thus we see, that the constitution provides that our negociations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigation,

on the one hand; and from secrecy and dispatch, on the other.

But to this plan, as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty, by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* law of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect, that a treaty is

only another name for a bargain; and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws, may, without doubt, amend or repeal them, and it will not be disputed that they who make treaties, may alter or cancel them; but still let us not forget, that treaties are made not by one only of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

However useful jealousy may be in republics, yet when, like bile in the natural, it abounds too much in the body politic; the eyes of both become very liable to be deceived, by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some, that the president and senate may make treaties without an equal eye to the interests of all the states. Others suspect, that the two-thirds will oppress the remaining third, and ask, whether those gentlemen are made sufficiently responsible for their conduct; whether, if they act corruptly, they can be punished? and if they make disadvantageous treaties, how are we to get rid of those treaties?

As all the states are equally represented in the senate, and by men the most able and the most wil-

ling to promote the interest of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons, and to insist on their punctual attendance. In proportion as the United States assume a national form, and a national character, so will the good of the whole be more and more an object of attention; and the government must be a weak one indeed, if it should forget, that the good of the whole can only be promoted, by advancing the good of each of the parts or members which compose the whole. It will not be in the power of the president and senate to make any treaties, by which they, and their families and estates, will not be equally bound and affected with the rest of the community; and having no private interest distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposeable. He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions, who can think it probable, that the president and two-thirds of the senate, will ever be capable of such unworthy conduct. The idea is too gross, and too invidious to be entertained. But if such a case should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honour, oaths, reputation, conscience, the love of country, family affections and attachments, afford security for their fidelity. In short, as the consti-

tution has taken the utmost care that they shall be men of talents and integrity, we have reason to be persuaded, that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behaviour is amply afforded by the article on the subject of impeachments.

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BY MR. HAMILTON.

A further view of the Constitution of the Senate, in relation to its Capacity, as a court for the trial of Impeachments.

THE remaining powers which the plan of the convention allots to the senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the business of appointments, the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will therefore conclude this head, with a view of the judicial character of the senate.

A well constituted court for the trial of impeachments, is an object not more to be desired, than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public

men, or in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly, or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

The delicacy and magnitude of a trust, which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders, or the tools of the most cunning or the most numerous faction; and on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

The convention, it appears, thought the senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion; and will be most inclined to allow due weight

to the arguments, which may be supposed to have produced it.

What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation, as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body; will not the reasons which indicate the propriety of this arrangement, strongly plead for an admission of the other branch of that body to a share of the inquiry? The model, from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain, it is the province of the house of commons to prefer the impeachment; and of the house of lords to decide upon it. Several of the state constitutions have followed the example. As well the latter, as the former, seem to have regarded the practice of impeachments, as a bridle in the hands of the legislative body, upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

Where else, than in the senate, could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation*, to preserve unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*

Could the supreme court have been relied upon as answering this description? It is much to be doubt-

ed whether the members of that tribunal would at all times, be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation, brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favour of personal security. There will be no jury to stand between the judges, who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion, which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

These considerations seem alone sufficient to authorize a conclusion, that the supreme court would have been an improper substitute for the senate, as a court of impeachments. There remains a further consideration, which will not a little strengthen this

conclusion. It is this: the punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honours and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons, who had disposed of his fame, and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision, would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision? Those who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate, would often be virtually included in a sentence, which, in its terms, imported nothing more than dismission from a present, and disqualification for a future office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate

upon the verdict of a jury, acting under the auspices of judges, who had predetermined his guilt?

Would it have been an improvement of the plan, to have united the supreme court with the senate, in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable? To a certain extent, the benefits of that union will be obtained from making the chief justice of the supreme court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter, will be substantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional pretext for clamour against the judiciary, which so considerable an augmentation of its authority would have afforded.

Would it have been desirable to have composed the court for the trial of impeachments of persons wholly distinct from the other departments of the government? There are weighty arguments, as well against as in favour of such a plan. To some minds, it will not appear a trivial objection, that it would tend to increase the complexity of the political machine, and to add a new spring to the government, the utility of which would at best be questionable. But an objection which will not be thought by any unworthy of attention, is this: a court formed upon such a plan, would either be attended with heavy expense, or might in practice be subject to a variety of casualties and inconveniences. It must either

consist of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends, or of certain officers of the state governments, to be called upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous; the first scheme will be reprobated by every man, who can compare the extent of the public wants with the means of supplying them; the second will be espoused with caution by those who will seriously consider the difficulty of collecting men dispersed over the whole union; the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty, from the opportunities which delay would afford for intrigue and corruption, and in some cases the detriment to the state, from the prolonged inaction of men, whose firm and faithful execution of their duty, might have exposed them to the persecution of an intemperate or designing majority in the house of representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified; yet it ought not to be forgotten, that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men.

But though one or the other of the substitutes which have been examined, or some other that might be devised, should, in this respect, be thought preferable to the plan reported by the convention, it will not follow, that the constitution ought for this reason to be rejected. If mankind were to resolve to agree in no institution of government, until every

part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. Where is the standard of perfection to be found? Who will undertake to unite the discordant opinions of a whole community in the same judgment of it; and to prevail upon one conceited projector to renounce his *infallible* criterion, for the *fallible* criterion of his more *conceited neighbour?* To answer the purpose of the adversaries of the constitution, they ought to prove, not merely that particular provisions in it are not the best which might have been imagined, but that the plan upon the whole is bad and pernicious.

PUBLIUS.

NUMBER LXVI.

BY MR. HAMILTON.

The same Subject continued.

A REVIEW of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavourable impressions which may still exist, in regard to this matter.

The *first* of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim, which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has

been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper, but necessary to the mutual defence of the several members of the government, against each other. An absolute or qualified negative in the executive, upon the acts of the legislative body, is admitted by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps with not less reason, be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body, upon the encroachments of the executive. The division of them between the two branches of the legislature; assigning to one the right of accusing, to the other the right of judging; avoids the inconvenience of making the same persons both accusers and judges: and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.

It is curious to observe with what vehemence this part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the constitution of this state; while that very constitution makes the senate, together with the chancellor and judges of the supreme court, not only a court of impeachments, but the highest judicatory in the state in all causes, civil

and criminal. The proportion in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the judiciary authority of New-York, in the last resort may, with truth, be said to reside in its senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the constitution of New-York*?

A *second* objection to the senate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The senate, it is observed, is to have concurrent authority with the executive in the formation of treaties, and in the appointment to offices: If, say the objectors, to these prerogatives is added that of determining in all cases of impeachment, it will give a decided predominancy to senatorial influence. To an objection so little precise in itself, it is not easy to find a very precise answer. Where is the measure or criterion to which we can appeal, for estimating what will give the senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations, to examine each power by itself, and to decide on general principles, where it may be deposited with most advantage, and least inconvenience?

If we take this course, it will lead to a more in-

* In that of New-Jersey, also, the final judiciary authority is in a branch of the legislature. In New-Hampshire, Massachusetts, Pennsylvania, and South-Carolina, one branch of the legislature is the court for the trial of impeachments.

telligible, if not to a more certain result. The disposition of the power of making treaties, which has obtained in the plan of the convention, will then, if I mistake not, appear to be fully justified by the considerations stated in a former number, and by others which will occur under the next head of our inquiries. The expediency of the junction of the senate with the executive, in the power of appointing to offices, will, I trust, be placed in a light not less satisfactory, in the disquisitions under the same head. And I flatter myself the observations in my last paper, must have gone no inconsiderable way towards proving, that it was not easy, if practicable, to find a more fit receptacle for the power of determining impeachments, than that which has been chosen. If this be truly the case, the hypothetical danger of the too great weight of the senate, ought to be discarded from our reasonings.

But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration of office prescribed for the senators. It was by them shown, as well on the credit of historical examples, as from the reason of the thing, that the most *popular* branch of every government, partaking of the republican genius, by being generally the favourite of the people, will be as generally a full match, if not an overmatch, for every other member of the government.

But, independent of this most active and operative principle; to secure the equilibrium of the national house of representatives, the plan of the convention has provided in its favour, several important counterpoises to the additional authorities to be conferred upon the senate. The exclusive privilege of originating money bills, will belong to

the house of representatives. The same house will possess the sole right of instituting impeachments: Is not this a complete counterbalance to that of determining them?—The same house will be the umpire in all elections of the president, which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently happen. The constant possibility of the thing, must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate, though contingent power of deciding the competitions of the most illustrious citizens of the union, for the first office in it. It would not perhaps be rash to predict, that as a mean of influence, it will be found to outweigh all the peculiar attributes of the senate.

A third objection to the senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle of this objection would condemn a practice, which is to be seen in all the state governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them. With equal plausibility might it be alleged in this case, that the favouritism of the latter, would always be an asylum for the misbehaviour of the former. But that practice, in contradiction to this principle, proceeds upon the presumption, that the responsibility of those who appoint, for the fitness and competency of the persons, on whom they be-

stow their choice, and the interest they have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition, to dismiss from a share in it, all such who by their conduct, may have proved themselves unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption, yet if it be in the main just, it must destroy the supposition, that the senate, who will merely sanction the choice of the executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.

If any further argument were necessary to evince the improbability of such a bias, it might be found in the nature of the agency of the senate, in the business of appointments.

It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice*, on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him: and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the ma-

jority of the senate would feel any other complacency towards the object of an appointment, than such as the appearances of merit might inspire, and proofs of the want of it destroy.

A fourth objection to the senate, in the capacity of a court of impeachments, is derived from their union with the executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they had been guilty?

This objection has been circulated with more earnestness, and with a greater show of reason, than any other which has appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous foundation.

The security essentially intended by the constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the chief magistrate of the union, and of two thirds of the members of a body selected by the collective wisdom of the legislature of the several states, is designed to be the pledge for the fidelity of the national councils in this particular. The convention might with propriety have meditated the punishment of the executive, for a deviation from the instructions of the senate, or a want of integrity in the conduct of the negociations committed to him: They might

also have had in view the punishment of a few leading individuals in the senate, who should have prostituted their influence in that body, as the mercenary instruments of foreign corruption: But they could not with more or with equal propriety have contemplated the impeachment and punishment of two-thirds of the senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature, consenting to a pernicious or unconstitutional law: a principle which I believe has never been admitted into any government. How in fact, could a majority of the house of representatives impeach themselves? Not better, it is evident, than two-thirds of the senate might try themselves. And yet what reason is there, that a majority of the house of representatives, sacrificing the interests of the society, by an unjust and tyrannical act of legislation, should escape with impunity, more than two-thirds of the senate, sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases it is essential to the freedom, and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

So far as might concern the misbehaviour of the executive in perverting the instructions, or contravening the views of the senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence, or to vindi-

cate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community; if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding, that there would be commonly no defect of inclination in the body, to divert the public resentment from themselves, by a ready sacrifice of the authors of their mismanagement and disgrace.

PUBLIUS.

NUMBER LXVII.

BY MR. HAMILTON.

Concerning the Constitution of the President; a gross attempt to misrepresent this part of the plan detected.

THE constitution of the executive department of the proposed government, next claims our attention.

There is hardly any part of the system, the arrangement of which could have been attended with greater difficulty, and there is perhaps none, which has been inveighed against with less candour, or criticised with less judgment.

Here the writers against the constitution, seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavoured to enlist all their jealousies and apprehensions in opposition to the intended president of the United States;

not merely as the embryo, but as the full-grown progeny of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New-York, have been magnified into more than royal prerogatives. He has been decorated with attributes, superior in dignity and splendour to those of a king of Great-Britain. He has been shown to us with the diadem sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses; giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness, have not been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janisaries; and to blush at the unveiled mysteries of a future seraglio.

Attempts extravagant as these to disfigure, or rather to metamorphose the object, render it necessary to take an accurate view of its real nature and form; in order to ascertain its true aspect and genuine appearance, to unmask the disingenuity, and to expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

In the execution of this task, there is no man who would not find it an arduous effort, either to behold with moderation, or to treat with seriousness, the devices not less weak than wicked, which have been contrived to pervert the public opinion in relation to the subject. They so far exceed the usual, though

unjustifiable, licenses of party-artifice, that even in a disposition the most candid and tolerant, they must force the sentiments which favour an indulgent construction of the conduct of political adversaries, to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretence of a similitude between a king of Great-Britain, and a magistrate of the character marked out for that of the president of the United States. It is still more impossible to withhold that imputation, from the rash and barefaced expedients which have been employed to give success to the attempted imposition.

In one instance, which I cite as a sample of the general spirit, the temerity has proceeded so far as to ascribe to the president of the United States a power, which by the instrument reported, is *expressly* allotted to the executives of the individual states. I mean the power of filling casual vacancies in the senate.

This bold experiment upon the discernment of his countrymen, has been hazarded by the writer who, (whatever may be his real merit,) has had no inconsiderable share in the applauses of his party*; and who, upon this false and unfounded suggestion, has built a series of observations equally false and unfounded. Let him now be confronted with the evidence of the fact; and let him, if he be able, justify or extenuate the shameful outrage he has offered to the dictates of truth, and to the rules of fair dealing.

The second clause of the second section of the

* See Cato, No. 5.

second article, empowers the president of the United States, "to nominate, and by and with the advice "and consent of the senate, to appoint ambassadors, "other public ministers and consuls, judges of the "supreme court, and all other *officers* of the United "States, whose appointments are *not* in the constitution *otherwise provided for*, and *which shall be established by law*." Immediately after this clause follows another in these words: "The president "shall have power to fill up all *vacancies* that may "happen *during the recess of the senate*, by granting "commissions which shall *expire at the end of their "next session*." It is from this last provision, that the pretended power of the president to fill vacancies in the senate has been deduced. A slight attention to the connexion of the clauses, and to the obvious meaning of the terms, will satisfy us, that the deduction is not even colourable.

The first of these two clauses, it is clear, only provides a mode for appointing such officers, "whose "appointments are *not otherwise provided for* in the "constitution, and which *shall be established by law*;" of course it cannot extend to the appointment of senators; whose appointments are *otherwise provided for* in the constitution*, and who are *established by the constitution*, and will not require a future establishment by law. This position will hardly be contested.

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the senate, for the following reasons: *First*. The relation in which that clause stands to the other, which declares the general

* Article 1. Sec. 3. Clause 1.

mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other; for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the president and senate *jointly*, and can therefore only be exercised during the session of the senate: but, as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the president, *singly*, to make temporary appointments "during the recess of the "senate, by granting commissions which should ex- "pire at the end of their next session." *Second.* If this clause is to be considered as supplementary to the one which precedes, the *vacancies* of which it speaks, must be construed to relate to the "officers" described in the preceding one; and this, we have seen, excludes from its description the members of the senate. *Third.* The time within which the power is to operate, "during the recess of the senate," and the duration of the appointments, "to the end of the next session" of that body, conspire to elucidate the sense of the provision, which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the state legislatures, who are to make the permanent appointments, and not to the recess of the national senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the state,

in whose representation the vacancies had happened, instead of making it to expire at the end of the ensuing session of the national senate. The circumstances of the body authorized to make the permanent appointments, would, of course, have governed the modification of a power which related to the temporary appointments; and, as the national senate is the body, whose situation is alone contemplated in the clause upon which the suggestion under examination has been founded, the vacancies to which it alludes can only be deemed to respect those officers, in whose appointment that body has a concurrent agency with the president. But, *lastly*, the first and second clauses of the third section of the first article, obviate all possibility of doubt. The former provides, that "the senate of the United States shall be "composed of two senators from each state, chosen *by the legislature thereof* for six years;" and the latter directs, that "if vacancies in that body should hap- "pen by resignation or otherwise, *during the recess of* "*the legislature of* ANY STATE, the executive THEREOF "may make temporary appointments until the *next* "*meeting of the legislature*, which shall then fill such "vacancies." Here is an express power given, in clear and unambiguous terms, to the state executives, to fill the casual vacancies in the senate, by temporary appointments; which not only invalidates the supposition, that the clause before considered could have been intended to confer that power upon the president of the United States; but proves, that this supposition, destitute as it is even of the merit of plausibility, must have originated in an intention to deceive the people, too palpable to be obscured by sophistry, too atrocious to be palliated by hypocrisy.

I have taken the pains to select this instance of

misrepresentation, and to place it in a clear and strong light, as an unequivocal proof of the unwarrantable arts which are practised, to prevent a fair and impartial judgment of the real merits of the plan submitted to the consideration of the people. Nor have I scrupled in so flagrant a case, to indulge a severity of animadversion, little congenial with the general spirit of these papers. I hesitate not to submit it to the decision of any candid and honest adversary of the proposed government, whether language can furnish epithets of too much asperity, for so shameless and so prostitute an attempt to impose on the citizens of America.

PUBLIUS.

NUMBER LXVIII.

BY MR. HAMILTON.

The View of the Constitution of the President continued, in relation to the mode of Appointment.

THE mode of appointment of the chief magistrate of the United States, is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit, that the election of the president is pretty well guarded*. I venture some-

* Vide Federal Farmer.

what further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for.

It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

It was also peculiarly desirable, to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government. But the precautions which have been so happily concerted in the system under consideration, promise an effectual security against this mischief. The choice of *several*, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of *one*, who was himself to be the final object of the public wishes. And as the electors, chosen in each state, are to assemble

and vote in the state in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, that might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the president to depend on pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the president in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the number of the electors. Thus, without corrupting the body of the people, the immediate agents in the election will at least enter upon the task, free from any sinister bias. Their transient existence, and their detached situation, already noticed, afford

a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time, as well as means. Nor would it be found easy suddenly to embark them, dispersed, as they would be, over thirteen states, in any combinations founded upon motives, which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another, and no less important, desideratum was, that the executive should be independent for his continuance in office, on all, but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favour was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will be happily combined in the plan devised by the convention, which is, that each state shall choose a number of persons as electors, equal to the number of senators and representatives of such state in the national government, who shall assemble within the state, and vote for some fit person as president. Their votes, thus given, are to be transmitted to the seat of the national government; and the person who may happen to have a majority of the whole number of votes, will be the president. But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided, that, in such a contingency,

the house of representatives shall select out of the candidates, who shall have the five highest numbers of votes, the man who, in their opinion, may be best qualified for the office.

This process of election affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours of a single state; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it, as would be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet, who says:

> "For forms of government, let fools contest—
> "That which is best administered, is best,"

—yet we may safely pronounce, that the true test of a good government is, its aptitude and tendency to produce a good administration.

The vice-president is to be chosen in the same manner with the president; with this difference, that the senate is to do, in respect to the former, what is to be done by the house of representatives, in respect to the latter.

The appointment of an extraordinary person, as vice-president, has been objected to as superfluous, if not mischievous. It has been alleged, that it would have been preferable to have authorized the senate to elect out of their own body an officer, answering to that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definitive resolution of the body, it is necessary that the president should have only a casting vote. And to take the senator of any state from his seat as senator, to place him in that of president of the senate, would be to exchange, in regard to the state from which he came, a constant for a contingent vote. The other consideration is, that, as the vice-president may occasionally become a substitute for the president, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great, if not with equal, force to the manner of appointing the other. It is remarkable, that, in this, as in most other instances, the objection which is made, would lie against the constitution of this state. We have a lieutenant-governor, chosen by the people at large, who presides in the senate, and is the constitutional substitute for the governor in casualties similar to those, which would authorize the vice-president to exercise the authorities, and discharge the duties of the president.

PUBLIUS.

NUMBER LXIX.

BY MR. HAMILTON.

The same view continued, with a comparison between the President and the King of Great-Britain, on the one hand, and the Governor of New-York, on the other.

I PROCEED now to trace the real characters of the proposed executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great-Britain, there is not less a resemblance to the Grand Signior, to the Khan of Tartary, to the man of the seven mountains, or to the governor of New-York.

That magistrate is to be elected for *four* years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances, there is a total dissimilitude between *him* and the king of Great-Britain; who is an *hereditary* monarch, possessing the crown as a patrimony descendible to his heirs for ever: but there is a close analogy between *him* and a governor of New-York, who is elected for *three* years, and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence

in a single state, than for establishing a like influence throughout the United States, we must conclude, that a duration of *four* years for the chief magistrate of the union, is a degree of permanency far less to be dreaded in that office, than a duration of *three* years for a correspondent office in a single state.

The president of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great-Britain, is sacred and inviolable: There is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected, without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the president of confederated America would stand upon no better ground than a governor of New-York, and upon worse ground than the governors of Virginia and Delaware.

The president of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for re-consideration; and the bill, so returned, is not to become a law, unless, upon that re-consideration, it be approved by two-thirds of both houses. The king of Great-Britain, on his part, has an absolute negative upon the acts of the two houses of parliament. The disuse of that power for a considerable time past, does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the

necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the president, differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this state, of which the governor is a constituent part. In this respect, the power of the president would exceed that of the governor of New-York; because the former would possess singly, what the latter shares with the chancellor and judges: But it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The president is to be the "commander in chief "of the army and navy of the United States, and of "the militia of the several states, when called into "the actual service of the United States. He is to "have power to grant reprieves and pardons for of-"fences against the United States, *except in cases of* "*impeachment;* to recommend to the consideration "of congress such measures as he shall judge neces-"sary and expedient; to convene, on extraordinary "occasions, both houses of the legislature, or either "of them, and in case of disagreement between "them *with respect to the time of adjournment*, to ad-"journ them to such time as he shall think proper; "to take care that the laws be faithfully executed; "and to commission all officers of the United States." In most of these particulars, the power of the president will resemble equally that of the king of Great-Britain, and of the governor of New-York. The most material points of difference are these:—*First.* The president will have only the occasional command

of such part of the militia of the nation, as by legislative provision may be called into the actual service of the union. The king of Great-Britain and the governor of New-York, have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the president, would be inferior to that of either the monarch or the governor. *Second.* The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature*. The governor of New-York, on the other hand, is by the constitution of the state vested only with the command of its militia and navy. But the constitutions of several of the states, expressly declare their

* A writer in a Pennsylvania paper under the signature of TAMONY, has asserted, that the king of Great-Britain owes his prerogatives, as commander in chief, to an annual mutiny bill. The truth is, on the contrary, that his prerogative, in this respect, is immemorial, and was only disputed, "contrary to all reason and precedent," as Blackstone, Vol. I. page 262, expresses it, by the long parliament of Charles First; but by the statute the 13th of Charles the Second, chap. 6. it was declared to be in the king alone, for that the sole supreme government and command of the militia within his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, EVER WAS AND IS the undoubted right of his majesty and his royal predecessors kings and queens of England, and that both or either house of parliament cannot nor ought to pretend to the same.

governors to be commanders in chief, as well of the army as navy; and it may well be a question, whether those of New-Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a president of the United States. *Third.* The power of the president, in respect to pardons, would extend to all cases, *except those of impeachment.* The governor of New-York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor in this article, on a calculation of political consequences, greater than that of the president? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New-York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility, he could insure his accomplices and adherents an entire impunity. A president of the union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps, be a greater temptation to undertake, and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure; and

might be incapacitated by his agency in it, from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect that, by the proposed constitution, the offence of treason is limited "to levying war upon the United States, and "adhering to their enemies, giving them aid and "comfort;" and that by the laws of New-York, it is confined within similar bounds. *Fourth.* The president can only adjourn the national legislature, in the single case of disagreement about the time of adjournment. The British monarch may prorogue, or even dissolve the parliament. The governor of New-York may also prorogue the legislature of this state for a limited time; a prerogative which, in certain situations, may be employed to very important purposes.

The president is to have power, with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. The king of Great-Britain is the sole and absolute representative of the nation, in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification of parliament. But I believe this doctrine was never heard of, till it was broached upon the present occasion. Every jurist* of that kingdom, and every other man acquainted with its constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the

* Vide Blackstone's Commentaries, vol. 1. page 257.

royal authority, have the most complete legal validity and perfection, independent of any other sanction. The parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its cooperation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition, proceeds from a different cause; from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions, to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the president, and the actual power of the British sovereign. The one can perform alone, what the other can only do with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal executive would exceed that of any state executive. But this arises naturally from the exclusive possession by the union, of that part of the sovereign power which relates to treaties. If the confederacy were to be dissolved, it would become a question, whether the executives of the several states were not solely invested with that delicate and important prerogative.

The president is also to be authorized to receive ambassadors, and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner,

than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor.

The president is to nominate, and *with the advice and consent of the senate*, to appoint ambassadors and other public ministers, judges of the supreme court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the constitution. The king of Great-Britain, is emphatically and truly styled, the fountain of honour. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the president in this particular, to that of the British king; nor is it equal to that of the governor of New-York, if we are to interpret the meaning of the constitution of the state by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the senate, chosen by the assembly. The governor *claims*, and has frequently *exercised* the right of nomination, and is *entitled* to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the president, and exceeds it in the article of the casting vote. In the national government, if the senate should be divided, no appointment could be made: In the government of New-York, if the council should be divided, the governor can turn the

scale and confirm his own nomination*. If we compare the publicity which must necessarily attend the mode of appointment by the president and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New-York, closetted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national senate would consist, we cannot hesitate to pronounce, that the power of the chief magistrate of this state, in the disposition of offices must, in practice, be greatly superior to that of the chief magistrate of the union.

Hence it appears, that, except as to the concurrent authority of the president in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the governor of New-York. And it appears yet more unequivocally, that there is no pretence for the parallel which has been attempted between him and the king of Great-Britain. But to render the contrast, in this respect, still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer groupe.

The president of the United States, would be an officer elected by the people for *four* years. The king of Great-Britain is a perpetual and *hereditary* prince.

* Candour however demands an acknowledgment, that I do not think the claim of the governor to a right of nomination well founded. Yet it is always justifiable to reason from the practice of a government, till its propriety has been constitutionally questioned. And independent of this claim, when we take into view the other considerations, and pursue them through all their consequences, we shall be inclined to draw much the same conclusion.

The one would be amenable to personal punishment and disgrace: The person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body: The other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation: The other, in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties: The other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments. The one can confer no privileges whatever: The other can make denizens of aliens, noblemen of commoners; can erect corporations, with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs; can regulate weights and measures; can lay embargoes for a limited time; can coin money; can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction: The other is the supreme head and governor of the national church!—What answer shall we give to those who would persuade us, that things so unlike resemble each other?—The same that ought to be given to those who tell us, that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS.

NUMBER LXX.

BY MR. HAMILTON.

The same view continued, in relation to the unity of the Executive, and with an examination of the project of an Executive Council.

THERE is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope, that the supposition is destitute of foundation; since they can never admit its truth, without, at the same time, admitting the condemnation of their own principles. Energy in the executive, is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man, the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals, who aspired to the tyranny, and the seditions of whole classes of the community, whose conduct threatened the existence of all government, as against the invasions of external enemies, who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble executive, implies a feeble execution of the government. A feeble execution, is but another phrase for a bad execution: and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the executive are, unity; duration; an adequate provision for its support; competent powers.

The ingredients which constitute safety in the republican sense are, a due dependence on the people; a due responsibility.

Those politicians and statesmen, who have been the most celebrated for the soundness of their principles, and for the justness of their views, have declared in favour of a single executive, and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people, and to secure their privileges and interests.

That unity is conducive to energy, will not be disputed. Decision, activity, secrecy, and dispatch,

will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways; either by vesting the power in two or more magistrates, of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the states. New-York and New-Jersey, if I recollect right, are the only states, which have intrusted the executive authority wholly to single men*. Both these methods of destroying the unity of the executive have their partizans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the executive. We have seen that the Achæans, on an experiment of two prætors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissentions between the consuls, and between the military tribunes, who were at times substituted to the consuls. But it gives no specimens

* New-York has no council except for the single purpose of appointing to offices; New-Jersey has a council, whom the governor may consult. But I think, from the terms of the constitution, their resolutions do not bind him.

of any peculiar advantages derived to the state, from the plurality of those magistrates. That the dissentions between them were not more frequent or more fatal, is matter of astonishment; until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the consuls, of making a division of the government between them. The patricians, engaged in a perpetual struggle with the plebeians, for the preservation of their ancient authorities and dignities; the consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defence of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the consuls to divide the administration between themselves by lot; one of them remaining at Rome to govern the city and its environs; the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the republic.

But quitting the dim light of historical research, and attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject, than to approve, the idea of plurality in the executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dig-

nity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissentions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into violent and irreconcileable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honour, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon, contrary to their sentiments. Men of upright and benevolent tempers, have too many opportunities of remarking with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public, may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned, must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favourable circumstances palliate, or atone for the disadvantages of dissention in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition—vigour and expedition; and this without any counterbalancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

It must be confessed, that these observations apply with principal weight to the first case supposed, that is, to a plurality of magistrates of equal dignity and authority; a scheme, the advocates for which are not likely to form a numerous sect: But they

apply, though not with equal, yet with considerable weight, to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible executive. An artful cabal in that council, would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions, would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults, and destroy responsibility. Responsibility is of two kinds, to censure and to punishment. The first is the most important of the two; especially in an elective office. Men in public trust, will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment. But the multiplication of the executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune, are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to

pronounce, to whose account the evil which may have been incurred is truly chargeable.

"I was over-ruled by my council. The council "were so divided in their opinions, that it was im- "possible to obtain any better resolution on the "point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble, or incur the odium of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be a collusion between the parties concerned, how easy is it to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties.

In this single instance in which the governor of this state is coupled with a council, that is, in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases indeed have been so flagrant, that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made, the blame has been laid by the governor on the members of the council; who, on their part, have charged it upon his nomination: while the people remain altogether at a loss to determine by whose influence their interests have been committed to hands so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

It is evident from these considerations, that the plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power. *First.*

The restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and *secondly*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment, in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department, an idea inadmissible in a free government. But even there, the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct, in the exercise of his office; and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behaviour in office, the reason which in the British constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great-Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate: which serves in some degree as a hostage to the national justice for his good behaviour. In the American republic it would serve to destroy, or would greatly diminish the intended and ne-

cessary responsibility of the chief magistrate himself.

The idea of a council to the executive, which has so generally obtained in the state constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men, than of a single man. If the maxim should be admitted to be applicable to the case, I should contend, that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion in this particular, with a writer whom the celebrated Junius pronounces to be "deep, solid, and ingenious," that "the executive power is more easily confined when it is "one*." That it is far more safe there should be a single object for the jealousy and watchfulness of the people; in a word, that all multiplication of the executive, is rather dangerous than friendly to liberty.

A little consideration will satisfy us, that the species of security sought for in the multiplication of the executive, is unattainable. Numbers must be so great as to render combination difficult; or they are rather a source of danger than of security. The united credit and influence of several individuals, must be more formidable to liberty, than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to

* De Lolme.

abuse, and more dangerous when abused, than if it be lodged in the hands of one man, who, from the very circumstance of his being alone, will be more narrowly watched, and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The decemvirs of Rome, whose name denotes their number*, were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions; are often the instruments and accomplices of his bad, and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures, too serious to be incurred for an object of equivocal utility.

I will only add, that prior to the appearance of the constitution, I rarely met with an intelligent man from any of the states, who did not admit, as the result of experience, that the unity of the exe-

* Ten.

cutive of this state was one of the best of the distinguishing features of our constitution.

PUBLIUS.

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BY MR. HAMILTON.

The same View continued, in regard to the Duration of the Office.

DURATION in office, has been mentioned as the second requisite to the energy of the executive authority. This has relation to two objects: To the personal firmness of the chief magistrate, in the employment of his constitutional powers; and to the stability of the system of administration, which may have been adopted under his auspices. With regard to the first, it must be evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a title durable or certain; and, of course, will be willing to risk more for the sake of the one, than of the other. This remark is not less applicable to a political privilege, or honour, or trust, than to any article of ordinary property. The inference from it is, that a man acting in the capacity of chief magistrate, under a conscious-

ness that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it, to hazard any material censure or perplexity, from the independent exertion of his powers, or from encountering the ill humours, however transient, which may happen to prevail, either in a considerable part of the society itself, or even in a predominant faction in the legislative body. If the case should only be, that he *might* lay it down, unless continued by a new choice; and if he should be desirous of being continued, his wishes, conspiring with his fears, would tend still more powerfully to corrupt his integrity, or debase his fortitude. In either case, feebleness and irresolution must be the characteristics of the station.

There are some, who would be inclined to regard the servile pliancy of the executive, to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted. The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men who flatter their prejudices, to betray their interests. It is a just observation, that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from

experience, that they sometimes err; and the wonder is, that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants; by the snares of the ambitious, the avaricious, the desperate; by the artifices of men who possess their confidence more than they deserve it; and of those who seek to possess, rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

But however inclined we might be, to insist upon an unbounded complaisance in the executive, to the inclinations of the people, we can, with no propriety, contend for a like complaisance to the humours of the legislature. The latter may sometimes stand in opposition to the former; and at other times the people may be entirely neutral. In either supposition, it is certainly desirable, that the executive should be in a situation to dare to act his own opinion with vigour and decision.

The same rule which teaches the propriety of a partition between the various branches of power, teaches, likewise, that this partition ought to be so contrived, as to render the one independent of the other. To what purpose separate the executive or

the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established. It is one thing to be subordinate to the laws, another to be dependent on the legislative body. The first comports with, the last violates the fundamental principles of good government; and whatever may be the forms of the constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people in a popular assembly, seem sometimes to fancy, that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege, and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum, as to make it very difficult for the other members of the government to maintain the balance of the constitution.

It may perhaps be asked, how the shortness of the duration in office can affect the independence of the executive on the legislature, unless the one were possessed of the power of appointing or displacing the other? One answer to this inquiry may be drawn from the principle already mentioned, that is, from the slender interest a man is apt to take in a short-

lived advantage, and the little inducement it affords him to expose himself, on account of it, to any considerable inconvenience or hazard. Another answer, perhaps more obvious, though not more conclusive, will result from the circumstance of the influence of the legislative body over the people; which might be employed to prevent the re-election of a man who, by an upright resistance to any sinister project of that body, should have made himself obnoxious to its resentment.

It may be asked, also, whether a duration of four years would answer the end proposed? And if it would not, whether a less period, which would at least be recommended by greater security against ambitious designs, would not, for that reason, be preferable to a longer period, which was, at the same time, too short for the purpose of inspiring the desired firmness and independence of the magistrate?

It cannot be affirmed, that a duration of four years, or any other limited duration, would completely answer the end proposd; but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government. Between the commencement and termination of such a period, there would always be a considerable interval, in which the prospect of an annihilation would be sufficiently remote, not to have an improper effect upon the conduct of a man endued with a tolerable portion of fortitude; and in which he might reasonably promise himself, that there would be time enough before it arrived, to make the community sensible of the propriety of the measures he might incline to pursue. Though it be probable, that, as he approached the moment

when the public were, by a new election, to signify their sense of his conduct, his confidence, and with it his firmness, would decline; yet both the one and the other would derive support from the opportunities which his previous continuance in the station had afforded him, of establishing himself in the esteem and good will of his constituents. He might then, with prudence, hazard the incurring of reproach, in proportion to the proofs he had given of his wisdom and integrity, and to the title he had acquired to the respect and attachment of his fellow-citizens.

As, on the one hand, a duration of four years will contribute to the firmness of the executive in a sufficient degree to render it a very valuable ingredient in the composition; so, on the other, it is not long enough to justify any alarm for the public liberty. If a British house of commons, from the most feeble beginnings, *from the mere power of assenting or disagreeing to the imposition of a new tax*, have, by rapid strides, reduced the prerogatives of the crown, and the privileges of the nobility, within the limits they conceived to be compatible with the principles of a free government; while they raised themselves to the rank and consequence of a co-equal branch of the legislature; if they have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments, as well in the church as state; if they have been able, on a recent occasion, to make the monarch tremble at the prospect of an innovation* attempted by them; what would be to be feared from an elective magistrate of four years duration, with the

* This was the case with respect to Mr. Fox's India bill, which was carried in the house of commons, and rejected in the house of lords, to the entire satisfaction, as it is said, of the people.

confined authorities of a president of the United States? What but that he might be unequal to the task which the constitution assigns him? I shall only add, that if his duration be such as to leave a doubt of his firmness, that doubt is inconsistent with a jealousy of his encroachments.

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BY MR. HAMILTON.

The same View continued, in regard to the re-eligibility of the President.

THE ADMINISTRATION of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negociations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war; these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive

their offices from his appointment, at least from his nomination, and to be subject to his superintendence. This view of the thing will at once suggest to us the intimate connexion between the duration of the executive magistrate in office, and the stability of the system of administration. To undo what has been done by a predecessor is very often considered by a successor as the best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing, that the dismission of his predecessor has proceeded from a dislike to his measures, and that the less he resembles him, the more he will recommend himself to the favour of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new president to promote a change of men to fill the subordinate stations; and these causes together, could not fail to occasion a disgraceful and ruinous mutability in the adminstration of the government.

With a positive duration of considerable extent, I connect the circumstance of re-eligibility. The first is necessary, to give the officer himself the inclination and the resolution to act his part well, and the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of their merits. The last is necessary to enable the people, when they see reason to approve of his conduct, to continue him in the station, in order to prolong the utility of his talents and virtues, and to secure to the government, the advantage of permanency in a wise system of administration.

Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which, in relation to the present point, has had some respectable advocates—I mean that of continuing the chief magistrate in office for a certain time, and then excluding him from it, either for a limited period, or for ever after. This exclusion, whether temporary or perpetual, would have nearly the same effects; and these effects would be for the most part rather pernicious than salutary.

One ill effect of the exclusion would be, a diminution of the inducements to good behaviour. There are few men who would not feel much less zeal in the discharge of a duty, when they were conscious that the advantage of the station, with which it was connected, must be relinquished at a determinate period, than when they were permitted to entertain a hope of *obtaining* by *meriting* a continuance of them. This position will not be disputed, so long as it is admitted, that the desire of reward is one of the strongest incentives of human conduct; or that the best security for the fidelity of mankind, is to make interest coincide with duty. Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them, if he could flatter himself with the prospect of being allowed to finish what he had begun, would, on the contrary, deter him from the undertaking, when he foresaw that he must quit the scene before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task. The most to be expected from the generality of men

in such a situation, is the negative merit of not doing harm, instead of the positive merit of doing good.

Another ill effect of the exclusion, would be the temptation to sordid views, to peculation, and, in some instances, to usurpation. An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the advantages he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of his opportunities, while they lasted; and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same person probably, with a different prospect before him, might content himself with the regular emoluments of his station, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice. Add to this, that the same man might be vain or ambitious, as well as avaricious. And if he could expect to prolong his honours by his good conduct, he might hesitate to sacrifice his appetite for them, to his appetite for gain. But with the prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition.

An ambitious man too, finding himself seated on the summit of his country's honours, looking forward to the time at which he must descend from the exalted eminence for ever, and reflecting that no exertion of merit on his part could save him from the unwelcome reverse, would be much more violently tempted to embrace a favourable conjuncture for attempting the prolongation of his power, at every

personal hazard, than if he had the probability of answering the same end by doing his duty.

Would it promote the peace of the community, or the stability of the government, to have half a dozen men who had had credit enough to raise themselves to the seat of the supreme magistracy, wandering among the people like discontented ghosts, and sighing for a place, which they were destined never more to possess?

A third ill effect of the exclusion would be, the depriving the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom, is an adage, the truth of which is recognized by the wisest, as well as the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential, than in the first magistrate of a nation? Can it be wise to put this desirable and essential quality under the ban of the constitution; and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? This, nevertheless, is the precise import of all those regulations which exclude men from serving their country, by the choice of their fellow-citizens, after they have, by a course of service, fitted themselves for doing it with a greater degree of utility.

A fourth ill effect of the exclusion would be, the banishing men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety. There is no nation which has not, at one period or another, experienced an absolute necessity of the

services of particular men, in particular situations, perhaps it would not be too strong to say, to the preservation of its political existence. How unwise, therefore, must be every such self-denying ordinance, as serves to prohibit a nation from making use of its own citizens, in the manner best suited to its exigencies and circumstances! Without supposing the personal essentiality of the man, it is evident that a change of the chief magistrate, at the breaking out of a war, or any similar crisis, for another even of equal merit, would at all times be detrimental to the community; inasmuch as it would substitute inexperience to experience, and would tend to unhinge and set afloat the already settled train of the administration.

A fifth ill effect of the exclusion would be, that it would operate as a constitutional interdiction of stability in the administration. By inducing the necessity of a change of men, in the first office in the nation, it would necessarily lead to a mutability of measures. It is not generally to be expected that men will vary, and measures remain uniform. The contrary is the usual course of things. And we need not be apprehensive that there will be too much stability, while there is even the option of changing; nor need we desire to prohibit the people from continuing their confidence where they think it may be safely placed; and where, by constancy on their part, they may obviate the fatal inconveniences of fluctuating councils, and a variable policy.

These are some of the disadvantages which would flow from the principle of exclusion. They apply most forcibly to the scheme of a perpetual exclusion; but when we consider, that even a partial one would always render the re-admission of the person a remote and precarious object, the observations which have

been made, will apply nearly as fully to one case, as to the other.

What are the advantages promised to counterbalance the evils? They are represented to be: 1st. Greater independence in the magistrate: 2d. Greater security to the people. Unless the exclusion be perpetual, there will be no pretence to infer the first advantage. But even in that case, may he have no object beyond his present station, to which he may sacrifice his independence? May he have no connexions, no friends, for whom he may sacrifice it? May he not be less willing, by a firm conduct, to make personal enemies, when he acts under the impression, that a time is fast approaching, on the arrival of which he not only MAY, but MUST be exposed to their resentments, upon an equal, perhaps upon an inferior footing? It is not an easy point to determine, whether his independence would be most promoted or impaired by such an arrangement.

As to the second supposed advantage, there is still greater reason to entertain doubts concerning it, especially if the exclusion were to be perpetual. In this case, as already intimated, a man of irregular ambition, of whom alone there could be reason in any case to entertain apprehensions, would, with infinite reluctance, yield to the necessity of taking his leave for ever of a post, in which his passion for power and pre-eminence had acquired the force of habit. And if he had been fortunate, or adroit enough to conciliate the good will of the people, he might induce them to consider as a very odious and unjustifiable restraint upon themselves, a provision which was calculated to debar them of the right of giving a fresh proof of their attachment to a favourite. There may be conceived circumstances in

which this disgust of the people, seconding the thwarted ambition of such a favourite, might occasion greater danger to liberty, than could ever reasonably be dreaded from the possibility of a perpetuation in office, by the voluntary suffrages of the community exercising a constitutional privilege.

There is an excess of refinement in the idea of disabling the people to continue in office men who had entitled themselves, in their opinion, to approbation and confidence; the advantages of which are at best speculative and equivocal, and are overbalanced by disadvantages far more certain and decisive.

PUBLIUS.

NUMBER LXXIII.

BY MR. HAMILTON.

The same View continued, in relation to the Provision concerning Support, and the Power of the Negative.

THE third ingredient towards constituting the vigour of the executive authority, is an adequate provision for its support. It is evident, that without proper attention to this article, the separation of the executive from the legislative department, would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the chief magistrate, could render him as obsequious to their will, as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their incli-

nations. These expressions, taken in all the latitude of the terms, would no doubt convey more than is intended. There are men who could neither be distressed, nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils: And in the main it will be found, that a power over a man's support, is a power over his will. If it were necessary to confirm so plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or seduction of the executive by the terrors or allurements of the pecuniary arrangements of the legislative body.

It is not easy, therefore, to commend too highly the judicious attention which has been paid to this subject in the proposed constitution. It is there provided, that "The president of the United States "shall at stated times receive for his service a com- "pensation, *which shall neither be increased nor di- "minished during the period for which he shall have "been elected*, and he shall *not receive within that pe- "riod any other emolument* from the United States, "or any of them." It is impossible to imagine any provision which would have been more eligible than this. The legislature, on the appointment of a president, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his avarice. Neither the union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive any other emolument, than that which may have been deter-

mined by the first act. He can of course have no pecuniary inducement to renounce or desert the independence intended for him by the constitution.

The last of the requisites to energy, which have been enumerated, is competent powers. Let us proceed to consider those which are proposed to be vested in the president of the United States.

The first thing that offers itself to our observation, is the qualified negative of the president upon the acts or resolutions of the two houses of the legislature; or, in other words, his power of returning all bills with objections, which will have the effect of preventing their becoming laws, unless they should afterwards be ratified by two-thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments, has been already more than once suggested; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles, results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body, to invade the rights of the execu-

tive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.

But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

The propriety of a negative has, upon some occasions, been combatted by an observation, that it was not to be presumed a single man would possess more virtue or wisdom than a number of men; and that unless this presumption should be entertained, it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive; but upon the supposition, that the legislative will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on mature reflection, would condemn. The primary inducement to conferring the power in question upon the executive, is to enable him to defend himself; the secon-

dary, is to increase the chances in favour of the community against the passing of bad laws, through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government at the same moment, and in relation to the same object, than that they should by turns govern and mislead every one of them.

It may perhaps be said, that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose, as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they may happen to be at any given period, as much more likely to do good than harm; because it is favourable to greater stability in the legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the executive in a trial of strength with that body, afford a satisfactory security, that

the negative would generally be employed with great caution; and that, in its exercise, there would oftener be room for a charge of timidity than of rashness. A king of Great-Britain, with all his train of sovereign attributes, and with all the influence he draws from a thousand sources, would, at this day, hesitate to put a negative upon the joint resolutions of the two houses of parliament. He would not fail to exert the utmost resources of that influence to strangle a measure disagreeable to him, in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect, or of risking the displeasure of the nation, by an opposition to the sense of the legislative body. Nor is it probable, that he would ultimately venture to exert his prerogative, but in a case of manifest propriety, or extreme necessity. All well-informed men in that kingdom will accede to the justness of this remark. A very considerable period has elapsed since the negative of the crown has been exercised.

If a magistrate, so powerful, and so well fortified as a British monarch, would have scruples about the exercise of the power under consideration, how much greater caution may be reasonably expected in a president of the United States, clothed, for the short period of four years, with the executive authority of a government wholly and purely republican?

It is evident, that there would be greater danger of his not using his power when necessary, than of his using it too often, or too much. An argument, indeed, against its expediency, has been drawn from this very source. It has been represented, on this account, as a power odious in appearance, useless in practice. But it will not follow, that because it

might rarely, it would never be exercised. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defence, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents; who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain one. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men, who, under any circumstances, will have the courage to do their duty at every hazard.

But the convention have pursued a mean in this business, which will both facilitate the exercise of the power vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body. Instead of an absolute, it is proposed to give the executive the qualified negative, already described. This is a power which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single VETO, might not scruple to return it for re-consideration; subject to being finally rejected, only in the event of more than one-third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence

would be united with his in supporting the propriety of his conduct in the public opinion. A direct and categorical negative, has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved, by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason it may in practice be found more effectual. It is to be hoped that it will not often happen, that improper views will govern so large a proportion as two-thirds of both branches of the legislature at the same time; and this too in defiance of the counterpoising weight of the executive. It is at any rate far less probable, that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the executive, will often have a silent and unperceived, though forcible operation. When men, engaged in unjustifiable pursuits, are aware, that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.

This qualified negative, as has been elsewhere remarked, is in this state vested in a council, consisting of the governor, with the chancellor and judges of the supreme court, or any two of them. It has been freely employed upon a variety of occasions, and frequently with success. And its utility has become so apparent, the persons who, in compiling

the constitution, were its violent opposers, have from experience become its declared admirers*.

I have in another place remarked, that the convention, in the formation of this part of their plan, had departed from the model of the constitution of this state, in favour of that of Massachusetts. Two strong reasons may be imagined for this preference. One, that the judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacity. The other, that by being often associated with the executive, they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the executive.

PUBLIUS.

NUMBER LXXIV.

BY MR. HAMILTON.

The same View continued, in relation to the Command of the National Forces, and the Power of Pardoning.

THE president of the United States, is to be "commander in chief of the army and navy of the

* Mr. Abraham Yates, a warm opponent of the plan of the convention, is of this number.

"United States, and of the militia of the several "states, *when called into the actual service* of the "United States." The propriety of this provision is so evident, and it is, at the same time, so consonant to the precedents of the state constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war, implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.

"The president may require the opinion, in writ- "ing, of the principal officer in each of the execu- "tive departments, upon any subject relating to the "duties of their respective offices." This I consider as a mere redundancy in the plan; as the right for which it provides would result of itself from the office.

He is also authorized "to grant reprieves and par- "dons for offences against the United States, *except* "*in cases of impeachment*." Humanity and good policy conspire to dictate, that the benign prerogative of pardoning, should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it

may be inferred, that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigour of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their number, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government, than a body of men.

The expediency of vesting the power of pardoning in the president has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one, or both of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body, or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the chief magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not

to be doubted that a single man of prudence and good sense, is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever. It deserves particular attention, that treason will often be connected with seditions, which embrace a large proportion of the community; as lately happened in Massachusetts. In every such case, we might expect to see the representation of the people tainted with the same spirit which had given birth to the offence. And when parties were pretty equally poised, the secret sympathy of the friends and favourers of the condemned, availing itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal argument for reposing the power of pardoning in this case in the chief magistrate, is this: In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed, that a discretionary power, with a view to such contingencies, might be occasionally confer-

red upon the president; it may be answered in the first place, that it is questionable whether, in a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic before hand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

PUBLIUS.

NUMBER LXXV.

BY MR. HAMILTON.

The same View continued, in relation to the Power of making Treaties.

THE president is to have power, "by and with the "advice and consent of the senate, to make treaties, "provided two-thirds of the senators present con-"cur."

Though this provision has been assailed on different grounds, with no small degree of vehemence, I scruple not to declare my firm persuasion, that it is one of the best digested, and most unexceptionable parts of the plan. One ground of objection is, the trite topic of the intermixture of powers; some contending, that the president ought alone to possess the prerogative of making treaties; others, that it ought to have been exclusively deposited in the senate.

Another source of objection is derived from the small number of persons by whom a treaty may be made: of those who espouse this objection, a part are of opinion, that the house of representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to have substituted two-thirds of *all* the members of the senate, to two thirds of the members *present*. As I flatter myself the observations made in a preceding number, upon this part of the plan, must have sufficed to place it, to a discerning eye, in a very favourable light, I shall here content myself with offering only some supplementary remarks, principally with a view to the objections which have been just stated.

With regard to the intermixture of powers, I shall rely upon the explanations heretofore given, of the true sense of the rule upon which that objection is founded; and shall take it for granted, as an inference from them, that the union of the executive with the senate, in the article of treaties, is no infringement of that rule. I venture to add, that the particular nature of the power of making treaties, indicates a peculiar propriety in that union. Though several writers on the subject of government, place that power in the class of executive authorities, yet this is evidently an arbitrary disposition: for if we attend carefully to its operation, it will be found to partake more of the legislative, than of the executive character, though it does not seem strictly to fall within the definition of either. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society: while the execution of the laws, and the employment of the common strength, either for this

purpose, or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enacting of new ones; and still less to an exertion of the common strength. Its objects are, CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems, therefore, to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed, as indispensable in the management of foreign negociations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole, or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments, where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years duration. It has been remarked, upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government, to be in any material danger of being corrupted by foreign powers: but that a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not

very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice duty to interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state for the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States.

To have intrusted the power of making treaties to the senate alone, would have been to relinquish the benefits of the constitutional agency of the president in the conduct of foreign negociations. It is true, that the senate would, in that case, have the option of employing him in this capacity; but they would also have the option of letting it alone; and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the senate could not be expected to enjoy the confidence and respect of foreign powers in the same extent with the constitutional representative of the nation; and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the

executive. Though it would be imprudent to confide in him solely so important a trust; yet it cannot be doubted, that his participation would materially add to the safety of the society. It must indeed be clear, to a demonstration, that the joint possession of the power in question, by the president and senate, would afford a greater prospect of security, than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a president, will be satisfied, that the office will always bid fair to be filled by men of such characters, as to render their concurrence, in the formation of treaties, peculiarly desirable, as well on the score of wisdom, as on that of integrity.

The remarks made in a former number, will apply with conclusive force against the admission of the house of representatives to a share in the formation of treaties. The fluctuating, and taking its future increase into the account, the mulitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch; are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the house of representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the pro-

gressive stages of a treaty, would be a source of so great inconvenience and expense, as alone ought to condemn the project.

The only objection which remains to be canvassed, is that which would substitute the proportion of two-thirds of all the members composing the senatorial body, to that of two-thirds of the members *present*. It has been shown, under the second head of our inquiries, that all provisions which require more than the majority of any body to its resolutions, have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavour to secure the advantage of numbers in the formation of treaties, as could have been reconciled either with the activity of the public councils, or with a reasonable regard to the major sense of the community. If two-thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed, is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman tribuneship, the Polish diet, and the states general of the Netherlands; did not an example at home, render foreign precedents unnecessary.

To require a fixed proportion of the whole body, would not, in all probability, contribute to the advantages of a numerous agency, better than merely to require a proportion of the attending members. The former, by increasing the difficulty of resolu-

tions disagreeable to the minority, diminishes the motives to punctual attendance. The latter, by making the capacity of the body to depend on a *proportion* which may be varied by the absence or presence of a single member, has the contrary effect. And as, by promoting punctuality, it tends to keep the body complete, there is great likelihood, that its resolutions would generally be dictated by as great a number in this case, as in the other; while there would be much fewer occasions of delay. It ought not to be forgotten, that under the existing confederation, two members *may*, and usually *do*, represent a state; whence it happens that congress, who now are solely invested with *all the powers* of the union, rarely consists of a greater number of persons than would compose the intended senate. If we add to this, that as the members vote by states, and that where there is only a single member present from a state, his vote is lost, it will justify a supposition, that the active voices in the senate, where the members are to vote individually, would rarely fall short in number of the active voices in the existing congress. When, in addition to these considerations, we take into view the co-operation of the president, we shall not hesitate to infer, that the people of America would have greater security against an improper use of the power of making treaties, under the new constitution, than they now enjoy under the confederation. And when we proceed still one step further, and look forward to the probable augmentation of the senate, by the erection of new states, we shall not only perceive ample ground of confidence in the sufficiency of the numbers, to whose agency that power will be intrusted; but we shall probably be led to conclude, that a body more numerous than

the senate is likely to become, would be very little fit for the proper discharge of the trust.

PUBLIUS.

NUMBER LXXVI.

BY MR. HAMILTON.

The same View continued, in relation to the Appointment of the Officers of the Government.

THE president is "to *nominate*, and by and with "the advice and consent of the senate, to appoint "ambassadors, other public ministers and consuls, "judges of the supreme court, and all other officers "of the United States, whose appointments are not "otherwise provided for in the constitution. But "the congress may by law vest the appointment of "such inferior officers as they think proper, in the "president alone, or in the courts of law, or in the "heads of departments. The president shall have "power to fill up *all vacancies* which may happen "*during the recess of the senate*, by granting commis-"sions which shall *expire* at the end of their next "session."

It has been observed in a former paper, that "the "true test of a good government, is its aptitude and "tendency to produce a good administration." If the justness of this observation be admitted, the mode of appointing the officers of the United States contained in the foregoing clauses, must, when examined, be allowed to be entitled to particular commendation. It is not easy to conceive a plan better

calculated to promote a judicious choice of men for filling the offices of the union; and it will not need proof, that on this point must essentially depend the character of its administration.

It will be agreed on all hands, that the power of appointment, in ordinary cases, can be properly modified only in one of three ways. It ought either to be vested in a single man, or in a *select* assembly of a moderate number; or in a single man, with the concurrence of such an assembly. The exercise of it by the people at large, will be readily admitted to be impracticable; since, waiving every other consideration, it would leave them little time to do any thing else. When, therefore, mention is made in the subsequent reasonings of an assembly or body of men, what is said must be understood to relate to a select body or assembly, of the description already given. The people collectively, from their number, and from their dispersed situation, cannot be regulated in their movements by that systematic spirit of cabal and intrigue, which will be urged as the chief objections to reposing the power in question in a body of men.

Those who have themselves reflected upon the subject, or who have attended to the observations made in other parts of these papers, in relation to the appointment of the president, will, I presume, agree to the position, that there would always be great probability of having the place supplied by a man of abilities, at least respectable. Premising this, I proceed to lay it down as a rule, that one man of discernment, is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment.

The sole and undivided responsibility of one man, will naturally beget a livelier sense of duty, and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify, than a body of men who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection. There is nothing so apt to agitate the passions of mankind, as personal considerations, whether they relate to ourselves or to others, who are to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party, will be more considered, than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent, "Give us the man we "wish for this office, and you shall have the one "you wish for that." This will be the usual condition of the bargain. And it will rarely happen,

that the advancement of the public service, will be the primary object either of party victories, or of party negociations.

The truth of the principles here advanced, seems to have been felt by the most intelligent of those who have found fault with the provision made, in this respect, by the convention. They contend, that the president ought solely to have been authorized to make the appointments under the federal government. But it is easy to show, that every advantage to be expected from such an arrangement would, in substance, be derived from the power of *nomination*, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided. In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but upon his previous nomination, every man who might be appointed, would be, in fact, his choice.

But his nomination may be over-ruled: This it certainly may; yet it can only be to make place for another nomination by himself. The person ultimately appointed, must be the object of his preference, though perhaps not in the first degree. It is also not probable, that his nomination would often be over-ruled. The senate could not be tempted, by

the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second, or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them: And as their dissent might cast a kind of stigma upon the individual rejected; and might have the appearance of a reflection upon the judgment of the chief magistrate; it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

To what purpose then require the co-operation of the senate? I answer, that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favouritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connexion, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the legislature. The possibility of rejection, would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of fa-

vouritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same state to which he particularly belonged, or of being, in some way or other, personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

To this reasoning it has been objected, that the president, by the influence of the power of nomination, may secure the complaisance of the senate to his views. The supposition of universal venality in human nature, is little less an error in political reasoning, than that of universal rectitude. The institution of delegated power implies, that there is a portion of virtue and honour among mankind, which may be a reasonable foundation of confidence: and experience justifies the theory. It has been found to exist in the most corrupt periods of the most corrupt governments. The venality of the British house of commons has been long a topic of accusation against that body, in the country to which they belong, as well as in this; and it cannot be doubted, that the charge is, to a considerable extent, well founded. But it is as little to be doubted, that there is always a large proportion of the body, which consists of independent and public spirited men, who have an influential weight in the councils of the nation. Hence it is, (the present reign not excepted,) that the sense of that body is often seen to control the inclinations of the monarch, both with regard

to men and to measures. Though it might therefore be allowable to suppose, that the executive might occasionally influence some individuals in the senate, yet the supposition, that he could in general purchase the integrity of the whole body, would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues, or exaggerating its vices, will see sufficient ground of confidence in the probity of the senate, to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the senate the only reliance. The constitution has provided some important guards against the danger of executive influence upon the legislative body: It declares, "that no senator or representative shall, "during the time *for which he was elected*, be ap- "pointed to any civil office under the United "States, which shall have been created, or the "emoluments whereof shall have been increased "during such time; and no person holding any of- "fice under the United States, shall be a member "of either house during his continuance in of- "fice."

PUBLIUS.

NUMBER LXXVII.

BY MR. HAMILTON.

The View of the Constitution of the President concluded, with a further Consideration of the Power of Appointment, and a concise Examination of his remaining Powers.

IT has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint*. A change of the chief magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man, in any station, had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change in favour of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which, from

* This construction has since been rejected by the legislature; and it is now settled in practice, that the power of displacing belongs exclusively to the president.

the greater permanency of its own composition, will, in all probability, be less subject to inconstancy, than any other member of the government.

To this union of the senate with the president, in the article of appointments, it has in some cases been objected, that it would serve to give the president an undue influence over the senate; and in others, that it would have an opposite tendency; a strong proof that neither suggestion is true.

To state the first in its proper form, is to refute it. It amounts to this—the president would have an improper *influence over* the senate; because the senate would have the power of *restraining* him. This is an absurdity in terms. It cannot admit of a doubt, that the entire power of appointment would enable him much more effectually to establish a dangerous empire over that body, than a mere power of nomination subject to their control.

Let us take a view of the converse of the proposition, "the senate would influence the executive." As I have had occasion to remark in several other instances, the indistinctness of the objection forbids a precise answer. In what manner is this influence to be exerted? In relation to what objects? The power of influencing a person, in the sense in which it is here used, must imply a power of conferring a benefit upon him. How could the senate confer a benefit upon the president by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favourite choice, when public motives might dictate a different conduct; I answer, that the instances in which the president could be personally interested in the result, would be too few to admit of his being materially affected

by the compliances of the senate. Besides this, it is evident, that the POWER which can *originate* the disposition of honours and emoluments, is more likely to attract, than to be attracted by the POWER which can merely obstruct their course. If by influencing the president be meant *restraining* him, this is precisely what must have been intended. And it has been shown, that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that magistrate. The right of nomination would produce all the good, without the ill.

Upon a comparison of the plan for the appointment of the officers of the proposed government, with that which is established by the constitution of this state, a decided preference must be given to the former. In that plan, the power of nomination is unequivocally vested in the executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public could be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one, would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The reverse of all this, characterizes the manner of appointment in this state The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them. It is known, that the governor claims the right of nomination, upon the strength of some ambiguous expressions in the constitution; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed. The censure of a bad appointment, on account of the uncertainty of its author, and for want of a determinate object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost. The most that the public can know, is, that the governor claims the right of nomination; that *two*, out of the considerable number of *four* men, can often be managed without much difficulty; that if some of the members of a particular council should happen to be of an uncomplying character, it is frequently not impossible to get rid of their opposition, by regulating the times of meeting in such a manner as to render their attendance inconvenient; and that, from whatever cause it may proceed, a great number of very improper appointments are from time to time made. Whether a governor of this state avails himself of the ascendant he must necessarily have, in this delicate and important part of the administration, to prefer to offices men who are best qualified for them; or whether he prostitutes that advantage to the advancement of persons, whose chief merit is their implicit devotion to his will, and to the support of a

despicable and dangerous system of personal influence, are questions which, unfortunately for the community, can only be the subjects of speculation and conjecture.

Every mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope. Their number, without an unwarrantable increase of expense, cannot be large enough to preclude a facility of combination. And as each member will have his friends and connexions to provide for, the desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places. The private attachments of one man might easily be satisfied; but to satisfy the private attachments of a dozen, or of twenty men, would occasion a monopoly of all the principal employments of the government, in a few families, and would lead more directly to an aristocracy or an oligarchy, than any measure that could be contrived. If to avoid an accumulation of offices, there was to be a frequent change in the persons who were to compose the council, this would involve the mischiefs of a mutable administration in their full extent. Such a council would also be more liable to executive influence than the senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council, in fine, as a substitute for the plan of the convention, would be productive of an increase of expense, a multiplication of the evils which spring from favouritism and intrigue in the distribution of public honours, a decrease of stability in the administration of the government, and a diminution of the security against an undue influence of the executive. And yet such a council has

been warmly contended for, as an essential amendment in the proposed constitution.

I could not with propriety conclude my observations on the subject of appointments, without taking notice of a scheme, for which there has appeared some, though but few advocates; I mean that of uniting the house of representatives in the power of making them. I shall, however, do little more than mention it, as I cannot imagine that it is likely to gain the countenance of any considerable part of the community. A body so fluctuating, and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected, that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the executive and of the senate, would be defeated by this union; and infinite delays and embarrassments would be occasioned. The example of most of the states in their local constitutions, encourages us to reprobate the idea.

The only remaining powers of the executive, are comprehended in giving information to congress of the state of the union; in recommending to their consideration such measures as he shall judge expedient; in convening them or either branch upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.

Except some cavils about the power of convening *either* house of the legislature, and that of receiving ambassadors, no objection has been made to this class

of authorities; nor could they possibly admit of any. It required indeed an insatiable avidity for censure, to invent exceptions to the parts which have been assailed. In regard to the power of convening either house of the legislature, I shall barely remark, that in respect to the senate at least, we can readily discover a good reason for it. As this body has a concurrent power with the executive in the article of treaties, it might often be necessary to call it together with a view to this subject, when it would be unnecessary and improper to convene the house of representatives. As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer.

We have now completed a survey of the structure and powers of the executive department, which I have endeavoured to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is—Does it also combine the requisites to safety in the republican sense—a due dependence on the people—a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances, the election of the president once in four years by persons immediately chosen by the people for that purpose; his liability, at all times, to impeachment, trial, dismission from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favour of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the chief magistrate of the United States would,

by that plan, be subjected to the control of a branch of the legislative body. What more can an enlightened and reasonable people desire?

PUBLIUS.

NUMBER LXXVIII.

BY MR. HAMILTON.

A View of the Constitution of the Judicial Department, in relation to the Tenure of good Behaviour.

WE proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged; as the propriety of the institution in the abstract is not disputed: the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States, are to hold their offices *during good behaviour;* which is conformable to the most approved of the state constitutions—among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power, must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence over

either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.

This simple view of the matter suggests several important consequences: it proves incontestibly, that the judiciary is, beyond comparison, the weakest of the three departments of power*; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislature and executive.—For I agree, that "there is no liberty, if the power "of judging be not separated from the legislative "and executive powers†." It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; that,

* Montesquieu, speaking of them, says, "of the three powers above "mentioned, the JUDICIARY is next to nothing." Spirit of Laws, vol. 1. page 186.

† Idem. page 181.

as nothing can contribute so much to its firmness and independence as PERMANENCY IN OFFICE, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and, in a great measure, as the CITADEL of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid.

To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the constitution. It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is supe-

rior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: so far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done: where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing

indicate the converse of that rule as proper to be followed. They teach us, that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate

reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies,* in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safe-guard against the effects of

* Vide Protest of the minority of the convention of Pennsylvania, Martin's speech, &c.

occasional ill humours in the society. These sometimes extend no further than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the ligislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold

their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a dispostion to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller, of those who unite

the requisite integrity with the requisite knowledge. These considerations apprize us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of judicial offices, in point of duration; and that, so far from being blameable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great-Britian affords an illustrious comment on the excellence of the institution. PUBLIUS.

NUMBER LXXIX.

BY MR. HAMILTON.

A further View of the Judicial Department, in relation to the Provisions for the Support and Responsibility of the Judges.

NEXT to permanency in office, nothing can contribute more to the independence of the judges, than

a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared that *permanent* * salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States "shall at *stated* "*times* receive for their services a compensation, "which shall not be *diminished* during their contin- "uance in office."

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet

* Vide Constitution of Massachusetts, Chap. 2. Sect. 1. Art. 13.

under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the president and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the president is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.

The precautions for their responsibility, are com-

prised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

The want of a provision for removing the judges, on account of inability, has been a subject of complaint. But all considerate men will be sensible, that such a provision would either not be practised upon, or would be more liable to abuse, than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities, than advance the interests of justice, or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The constitution of New-York, to avoid investigations that must for ever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station, in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period, in men who survive it; and when, in addition to this

circumstance, we consider how few there are who outlive the season of intellectual vigour, and how improbable it is, that any considerable proportion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude, that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity, than is to be found in the imaginary danger of a superannuated bench.

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BY MR. HAMILTON.

A further View of the Judicial Department, in relation to the Extent of its Powers.

To judge with accuracy of the due extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases. 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d. To all those which con-

cern the execution of the provisions expressly contained in the articles of union; 3d. To all those in which the United States are a party; 4th. To all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. To all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiassed.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the states.

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE, ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal

jurisdiction, the latter for that of the states. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty, or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion, and those of the other. So great a proportion of the controversies in which foreigners are parties, involve national questions, that it is by far most safe, and most expedient, to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union, than that which has been just examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany, prior to the institution of the IMPERIAL CHAMBER by Maximilian, towards the close of the fifteenth century: and informs us, at the same time, of the vast influence of that institution, in appeasing the disorders, and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the states, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are other sources, besides inter-

fering claims of boundary, from which bickerings and animosities may spring up among the members of the union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured, that I allude to the fraudulent laws which have been passed in too many of the states. And though the proposed constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend, that the spirit which produced them, will assume new shapes that could not be foreseen, nor specifically provided against. Whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.

It may be esteemed the basis of the union, that "the citizens of each state shall be entitled to all "the privileges and immunities of citizens of the "several states." And if it be a just principle, that every government *ought to possess the means of executing its own provisions, by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases, in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union,

will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigoted idolizers of state authority, have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present confederation, submitted to federal jurisdiction.

The reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts, as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation, in regard to some cases, between the citizens of the same state. Claims to land under grants of different states, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And where this had not been done, it would be natural that the judges, as men, should feel a strong predelection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the

federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend "all cases in law and equity "arising under the constitution, the laws of the "United States, and treaties made, or which shall "be made, under their authority; to all cases af- "fecting ambassadors, other public ministers and "consuls; to all cases of admiralty and maritime "jurisdiction; to controversies to which the United "States shall be a party; to controversies between "two or more states; between a state and citizens "of another state; between citizens of different "states; between citizens of the same state, claim- "ing lands under grants of different states; and "between a state or the citizens thereof, and foreign "states, citizens, and subjects." This constitutes the entire mass of the judicial authority of the union. Let us now review it in detail. It is then to extend,

First. To all cases in law and equity, *arising under the constitution* and *the laws of the United States.* This corresponds with the two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States. It has been asked, what is meant by "cases arising under the con- "stitution," in contradistinction from those "aris- "ing under the laws of the United States?" The difference has been already explained. All the restrictions upon the authority of the state legislatures furnish examples. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connexion with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies

concerning it would be cases arising under the constitution, and not under the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity?" What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation, between individuals, which may not involve those ingredients of *fraud*, *accident*, *trust*, or *hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states. It is the peculiar province, for instance, if a court of equity, to relieve against what are called hard bargains: These are contracts, in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different states, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those states where the formal and technical distinction between LAW and EQUITY is not maintained, as in this state, where it is exemplified by every day's practice.

The judiciary authority of the union is to extend—

Second. To treaties made, or which shall be made, under the authority of the United States, and to all

cases affecting ambassadors, other public ministers, and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connexion with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, altogether, the fifth of the enumerated classes of causes, proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more states; between a state, and the citizens of another state; between citizens of different states. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same state, *claiming lands under grants of different states.* These fall within the last class, and *are the only instances in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*

Seventh. To cases between a state, and the citizens thereof, and foreign states, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes; and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the

incorporation of any of them into the plan, it ought to be recollected, that the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations, as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well informed mind, as a solid objection to a principle which is calculated to avoid general mischiefs, and to obtain general advantages.

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BY MR. HAMILTON.

A further View of the Judicial Department, in relation to the Distribution of its Authority.

LET us now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is to "be vested in one supreme court, and in such infe- "rior courts as the congress may from time to time "ordain and establish*." That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body, or a branch of the legislature. The same contradiction is ob-

* Article 3. Sect. 1.

servable in regard to this matter, which has been remarked in several other cases. The very men who object to the senate as a court of impeachments, on the ground of an improper intermixture of powers, are advocates, by implication at least, for the propriety of vesting the ultimate decision of all causes, in the whole, or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the supreme court of the United States, "which is to be a separate and independent body, "will be superior to that of the legislature. The "power of construing the laws according to the *spirit* of the constitution, will enable that court to "mould them into whatever shape it may think "proper; especially as its decisions will not be in "any manner subject to the revision or correction "of the legislative body. This is as unprecedented "as it is dangerous. In Britain, the judicial "power in the last resort resides in the house of "lords, which is a branch of the legislature; and this "part of the British Government has been imitated "in the state constitutions in general. The parliament of Great Britain, and the legislatures of the "several states, can at any time rectify by law, "the exceptionable decisions of their respective "courts. But the errors and usurpations of the supreme court of the United States, will be uncontrollable and remediless." This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude

in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection, therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the supreme court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great-Britain, and in that of this state. To insist upon this point, the authors of the objection must renounce the meaning they have laboured to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone, to be less eligible than the mode preferred by the convention. From a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and

moderate them in the application. The same spirit which had operated in making them, would be too apt to influence their construction: still less could it be expected, that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach in that of judges. Nor is this all: every reason which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowlege. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information; so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition, of those who have repre-

sented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New-Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia; and the preference which has been given to these models is highly to be commended.

It is not true, in the second place, that the parliament of Great-Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done, by a future legislature of the United States. The theory neither of the British nor the state constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed constitution, more than in either of them, by which it is forbidden. In the former, as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed, that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an incon-

venience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the senate a court for the trial of impeachments.

Having now examined, and I trust removed, the objections to the distinct and independent organization of the supreme court; I proceed to consider the propriety of the power of constituting inferior courts *, and the relations which will subsist between these and the former.

* This power has been absurdly represented as intended to abolish all the county courts in the several states, which are commonly called inferior courts. But the expressions of the constitution are to constitute "tribunals INFERIOR TO THE SUPREME COURT," and the evident design of the provision is, to enable the institution of local courts, subordinate to the supreme, either in states or larger districts. It is ridiculous to imagine, that county courts were in contemplation.

The power of constituting inferior courts, is evidently calculated to obviate the necessity of having recourse to the supreme court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? This admits of different answers.—Though the fitness and competency of these courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to authorize the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer upon the existing courts of the several states the power of determining such causes, would perhaps be as much "to consti- "tute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding to them

the original cognizance of causes arising under those laws, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention, I should consider every thing calculated to give, in practice, an *unrestrained course* to appeals, as a source of public and private inconvenience.

I am not sure but that it will be found highly expedient and useful, to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state. The judges of these courts may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is seen in the proposed constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the union.

The supreme court is to be invested with original jurisdiction only "in cases affecting ambassadors, "other public ministers and consuls, and those in

" which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds: It has been suggested, that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual, *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are

necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done, without waging war against the contracting state: and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations: we have seen that the original jurisdiction of the supreme court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals, and the supreme court would have nothing more than an appellate jurisdiction, "with such *exceptions*, "and under such *regulations*, as the congress shall "make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamours have been loud against it,

as applied to matters of fact. Some well-intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favour of the civil law mode of trial, which prevails in our courts of admiralty, probates, and chancery. A technical sense has been affixed to the term "appellate," which in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New-England. There an appeal from one jury to another, is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in New-England, as in New-York, which shows the impropriety of a technical interpretation derived from the jurisprudence of a particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision; in a new government it must depend on the latter, and may be with or without the aid of a jury, as may be judged adviseable. If, therefore, the re-examination of a fact once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the supreme court.

But it does not follow, that the re-examination of

a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this state, that the latter has jurisdiction* of the fact, as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both fact and law, nor is it even possible to separate them. Though the common law courts of this state ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the supreme court, it may have been argued, will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only, will be, generally speaking, the proper province of the supreme court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes

* This word is a compound of JUS and DICTIO, juris, dictio, or a speaking or pronouncing of the law.

are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the states, *all causes* are tried in this mode*; and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt, that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the supreme court there should be no re-examination of facts, where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on

* I hold that the states will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

the authority of the judicial department is this:—That it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature: that, in the partition of this authority, a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals; that the supreme court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought adviseable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils, will ensure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

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BY MR. HAMILTON.

A further View of the Judicial Department, in reference to some Miscellaneous Questions.

THE erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution found-

ed upon the total or partial incorporation of a number of distinct sovereignties. Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.

Such questions accordingly have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the state courts, in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper*, teach us, that the states will retain all *pre-existing* authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is, in express terms, granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states; or, where an authority is granted to the union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary, as to the legislative power; yet I am inclined to think, that they are in the main, just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule, that the state courts will *retain* the jurisdiction

* No. XXXII.

they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance, to the federal courts, is contained in this passage: "The JUDICIAL POWER of the "United States *shall be vested* in one supreme court, "and in *such* inferior courts as the congress shall from "time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the union should alone have the power of deciding those causes, to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one supreme court, and as many subordinate courts as congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals: and as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction.

But this doctrine of concurrent jurisdiction, is only clearly applicable to those descriptions of causes, of which the state courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the constitution to be established: for not to allow the state courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority, I mean not, therefore, to contend, that the United States, in the course of legislation upon the objects intrusted to their direction, may

not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New-York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

Here another question occurs; what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution, in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one; without a single expression to confine

its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decision. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the union. To confine, therefore, the general expressions which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the state

courts, to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature "to constitute tri- "bunals inferior to the supreme court*". It declares in the next place, that "the JUDICIAL POWER "of the United States *shall be vested* in one supreme "court, and in such inferior courts as congress shall "ordain and establish;" and it then proceeds to enumerate the cases, to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are, that they shall be "inferior to the supreme court," and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals: and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals, may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made

* Section 8th, Article 1st.

to lie from the state courts, to district courts of the union.

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BY MR. HAMILTON.

A further View of the Judicial Department, in Relation to the Trial by Jury.

THE objection to the plan of the convention, which has met with most success in this state, is relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the constitution in regard to *civil causes*, is represented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext, are artfully calculated to induce a persuasion that this pretended abolition is complete and universal; extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter, would be as vain and fruitless, as to attempt to demonstrate any of those propositions which, by their own internal evidence, force conviction when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation, having been employed to countenance the surmise, that a thing which is

only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature, "a specification of particulars, is an exclusion of generals;" or, "the expression of one thing, is the exclusion of another." Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury, in regard to the latter.

The rules of legal interpretation, are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them, is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain, that an injunction of the trial by jury, in certain cases, is an interdiction of it in others.

A power to constitute courts, is a power to prescribe the mode of trial; and consequently, if no-

thing was said in the constitution on the subject of juries the legislature would be at liberty either to adopt that institution, or to let it alone. This discretion, in regard to criminal causes, is abridged by an express injunction; but it is left at large in relation to civil causes, for the very reason that there is a total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation of employing the same mode in civil causes, but does not abridge *the power* of the legislature to appoint that mode, if it should be thought proper. The pretence, therefore, that the national legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all foundation.

From these observations, this conclusion results, that the trial by jury in civil cases would not be abolished, and that the use attempted to be made of the maxims which have been quoted, is contrary to reason, and therefore inadmissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them upon the present occasion, which however is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Having now seen that the maxims relied upon will not bear the use made of them, let us endeavour to ascertain their proper application. This will be best done by examples. The plan of the convention declares, that the power of congress, or in other words, of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars

evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended.

In like manner, the authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases, marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority.

These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used.

From what has been said, it must appear unquestionably true, that trial by jury is in no case obolished by the proposed constitution; and it is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the situation in which it is placed by the state constitutions. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the state courts only, and in the manner which the state constitutions and laws prescribe. All land causes, except where claims under the grants of different states come into question, and all other controversies between the citizens of the same state, unless where they depend upon positive violations of the articles of the union, by acts of the state legislatures, will belong exclusively to the jurisdiction of the state tribunals. Add to this, that admiralty causes, and almost all those which are of

equity jurisdiction are determinable under our own government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected, to any great extent, by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge, that I cannot readily discern the inseparable connexion between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone conerned in

the question. And both of these are provided for in the most ample manner, in the plan of the convention.

It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers intrusted with the execution of the revenue laws

As to the mode of collection in this state, under our own constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public, nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burthensome than the original sum of the tax to be levied.

And as to the conduct of the officers of the revenue, the provision in favour of trial by jury in criminal cases, will afford the desired security. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the government; for which the persons who commit them may be indicted and punished according to the circumstances of the case. The excellence of the trial by jury in civil cases,

appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favour is, that it is a security against corruption. As there is always more time, and better opportunity to tamper with a standing body of magistrates, than with a jury summoned for the occasion, there is room to suppose, that a corrupt influence would more easily find its way to the former, than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors, who would serve the purpose of the party, as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practise upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions. By increasing the ob-

stacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.

Notwithstanding, therefore, the doubts I have expressed, as to the essentiality of trial by jury in civil suits to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone, it would be entitled to a constitutional provision in its favour, if it were possible to fix with accuracy the limits within which it ought to be comprehended. This, however, is in its own nature an affair of much difficulty; and men not blinded by enthusiasm, must be sensible, that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, the difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles, which we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

The great difference between the limits of the jury trial in different states, is not generally understood. And as it must have considerable influence on the sentence we ought to pass upon the omission complained of, in regard to this point, an explanation of it is necessary. In this state, our judicial establishments resemble more nearly, than in any other, those of Great-Britain. We have courts of common

law, courts of probates, (analogous in certain matters to the spiritual courts in England,) a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others, a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury*. In New-Jersey there is a court of chancery which proceeds like ours, but neither courts of admiralty, nor of probates, in the sense in which these last are established with us. In that state, the courts of common law have the cognizance of those causes, which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New-Jersey, than in New-York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that state, and its common law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New-York, as does also Virginia, except that the latter has a plurality of chancellors. North-Carolina bears most affinity to Pennsylvania; South-Carolina to Virginia. I believe, however, that in some of those states which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common law courts, and an appeal of course lies from the verdict of one jury

* It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.

to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts, either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their general assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* further than in any other state yet mentioned. Rhode-Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New-Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four eastern states, the trial by jury not only stands upon a broader foundation than in the other states, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal *of course* from one jury to another, till there have been two verdicts out of three on one side.

From this sketch it appears, that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several states; and from this fact, these obvious reflections flow. First, that no general rule could have been fixed upon by the convention, which would have corresponded with the circumstances of all the states; and secondly, that more, or at least as much might have been hazarded, by taking the system of any one state for a standard, as by omitting a provision altogether, and leaving the matter as has been done to legislative regulation.

The propositions which have been made for supplying the omission, have rather served to illustrate,

than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose, "trial by jury shall be as heretofore;" and this I maintain would be inapplicable and indeterminate. The United States, in their collective capacity, are the OBJECT to which all general provisions in the constitution must be understood to refer. Now it is evident, that though trial by jury, with various limitations, is known in each state individually, yet in the United States, *as such*, it is, strictly speaking, unknown; because the present federal government has no judiciary power whatever; and consequently there is no antecedent establishment, to which the term *heretofore* could properly relate. It would therefore be destitute of precise meaning, and inoperative from its uncertainty.

As on the one hand, the form of the provision would not fulfil the intent of its proposers; so on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would obtain in a similar case in the state courts—that is to say, admiralty causes should be tried in Connecticut by a jury, in New-York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction,

that there are many cases in which the trial by jury is an ineligible one. I think it so particularly, in suits which concern the public peace with foreign nations; that is in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations, that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy, which ought to guide their inquiries. There would of course be always danger, that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the true province of juries be to determine matters of fact, yet in most cases, legal consequences are complicated with fact in such a manner, as to render a separation impracticable.

It will add great weight to this remark, in relation to prize causes, to mention, that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great-Britain in the last resort before the king himself in his privy council, where the fact as well as the law, undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the constitution which would make the state systems a standard for the national government in the article under consideration, and the danger of incumbering the government with any constitutional provisions, the propriety of which is not indisputable.

My convictions are equally strong, that great ad-

vantages result from the separation of the equity from the law jurisdiction; and that the causes which belong to the former, would be improperly committed to juries. The great and primary use of a court of equity, is to give relief *in extraordinary cases*, which are *exceptions** to general rules. To unite the jurisdiction of such cases, with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination: while a separation between the jurisdictions has the contrary effect, of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require, that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery, frequently comprehend a long train of minute and independent particulars.

It is true, that the separation of the equity from the legal jurisdiction, is peculiar to the English system of jurisprudence; the model which has been followed in several of the states. But it is equally

* It is true, that the principles by which that relief is governed, are now reduced to a regular system; but it is not the less true, that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules.

true, that the trial by jury has been unknown in every instance in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law, but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity, will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this state, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appear to be conclusive reasons against incorporating the systems of all the states, in the formation of the national judiciary; according to what may be conjectured to have been the intent of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

It is in this form: "In civil actions between citizens of different states every issue of fact, arising in *actions at common law*, may be tried by a jury, if the parties, or either of them, request it."

This, at best, is a proposition confined to one description of causes; and the inference is fair either that the Massachusetts convention considered that as the only class of federal causes, in which the trial by jury would be proper; or that, if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object, can never be considered

as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: if we advert to the observations already made respecting the courts that subsist in the several states of the union, and the different powers exercised by them, it will appear, that there are no expressions more vague and indeterminate than those which have been employed to characterize *that* species of causes which it is intended shall be entitled to a trial by jury. In this state, the boundaries between actions at common law, and actions of equitable jurisdiction, are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other states, the boundaries are less precise. In some of them, every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one state a cause would receive its determination from a jury, if the parties, or either of them requested it; but in another state, a cause exactly similar to the other, must be decided without the intervention of a jury, because the state tribunals varied as to common law jurisdiction.

It is obvious, therefore, that the Massachusetts proposition cannot operate as a general regulation, until some uniform plan, with respect to the limits of common law and equitable jurisdictions, shall be adopted by the different states. To devise a plan of

that kind, is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the states in the union, or that would perfectly quadrate with the several state institutions.

It may be asked, why could not a reference have been made to the constitution of this state, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer, that it is not very probable the other states should entertain the same opinion of our institutions which we do ourselves. It is natural to suppose that they are more attached to their own, and that each would struggle for the preference. If the plan of taking one state as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body, would have been rendered difficult by the predilection of each representation in favour of its own government; and it must be uncertain which of the states would have been taken as the model. It has been shown, that many of them would be improper ones. And I leave it to conjecture whether, under all circumstances, it is most likely that New-York, or some other state, would have been preferred. But admit that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other states, at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext, for raising a host of local prejudices against it, which perhaps might

have hazarded, in no inconsiderable degree, its final establishment.

To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers, that a provision might have been inserted for establishing it in all cases whatsoever. For this, I believe no precedent is to be found in any member of the union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania, must satisfy every sober mind, that the establishment of the trial by jury in *all* cases, would have been an unpardonable error in the plan.

In short, the more it is considered, the more arduous will appear the task of fashioning a provision in such a form, as not to express too little to answer the purpose, or too much to be adviseable; or which might not have opened other sources of opposition to the great and essential object, of introducing a firm national government.

I cannot but persuade myself on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing, in candid minds, the apprehensions they may have entertained on the point. They have tended to show, that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, those in which the great body of the community is interested, that mode of trial will remain in full force, as established in the state constitutions, untouched and unaffected by the plan of the con-

vention: that it is in no case abolished* by that plan; and that there are great, if not insurmountable difficulties in the way of making any precise and proper provision for it, in a constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit, that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that, even in this state, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great-Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose, that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great-Britain, and it is equally so in the state of

* Vide No. LXXXI. in which the supposition of its being abolished by the appellate jurisdiction in matters of fact, being vested in the supreme court, is examined and refuted.

Connecticut; and yet it may be safely affirmed, that more numerous encroachments have been made upon the trial by jury in this state since the revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut or Great-Britain. It may be added, that these encroachments have generally originated with the men who endeavour to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favourite career. The truth is, that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them: and the want of them will never be with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

It certainly sounds not a little harsh and extraordinary to affirm, that there is no security for liberty in a constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular state in the union, can boast of no constitutional provision for either.

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NUMBER LXXXIV.

BY MR. HAMILTON.

Concerning several Miscellaneous Objections.

IN the course of the foregoing review of the constitution, I have endeavoured to answer most of the objections which have appeared against it. There remain, however, a few which either did not fall naturally under any particular head, or were forgotten in their proper places. These shall now we discussed: but as the subject has been drawn into great length, I shall so far consult brevity, as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is, that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked, that the constitutions of several of the states are in a similar predicament. I add, that New-York is of the number. And yet the persons who in this state oppose the new system, while they profess an unlimited admiration for our particular constitution, are among the most intemperate partizans of a bill of rights. To justify their zeal in this matter, they allege two things: one is, that though the constitution of New-York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favour of particular privileges and rights, which, in sub-

stance, amount to the same thing; the other is, that the constitution adopts, in their full extent, the common and statute law of Great-Britain, by which many other rights, not expressed, are equally secured.

To the first I answer, that the constitution offered by the convention contains, as well as the constitution of this state, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article I. section 3. clause 7. "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." Section 9. of the same article, clause 2. "The privilege of the writ of *harbeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3. "No bill of attainder or *ex post facto* law shall be passed." Clause 7. "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." Article III. section 2. clause 3. "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." Sec-

tion 3. of the same article, " Treason against the " United States shall consist only in levying war " against them, or in adhering to their enemies, giv- " ing them aid and comfort. No person shall be " convicted of treason, unless on the testimony of " two witnesses to the same overt act, or on confession " in open court." And clause 3. of the same section, " The congress shall have power to declare the " punishment of treason ; but no attainder of treason " shall work corruption of blood, or forfeiture, ex- " cept during the life of the peron attainted."

It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this state. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provisions in our constitution*, are perhaps greater securities to liberty than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law ; and the practice of arbitrary imprisonments, have been, in all ages, the favourite and most formidable instruments of tyranny. The observations of the judicious Blackstone,* in reference to the latter, are well worthy of recital : " To bereave a man of life, (says he,) or " by violence to confiscate his estate, without accusa- " tion or trial, would be so gross and notorious an " act of despotism, as must at once convey the alarm " of tyranny throughout the whole nation ; but con- " finement of the person, by secretly hurrying him " to jail, where his sufferings are unknown or for-

* Vide Blackstone's Commentaries, vol. 1, page 136.

" gotten, is a less public, a less striking, and there-
" fore *a more dangerous engine* of arbitrary govern-
ment." And as a remedy for this fatal evil, he is every where peculiary emphatical in his encomiums on the *habeas corpus* act, which in one place he calls " the BULWARK of the British constitution*."

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.

To the second, that is, to the pretended establishment of the common and statute law by the constitution, I answer, that they are expressly made subject " to such alterations and provisions as the legislature " shall from time to time make concerning the same." They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law, and to remove doubts which might have been occasioned by the revolution. This consequently can be considered as no part of a declaration of rights; which under our constitutions must be intended to limit the power of the government itself.

It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favour of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the Barons, sword in hand, from king John. Such were the subsequent confirmations of

* Black. Com. vol. 4, page 438.

that charter by succeeding princes. Such was the *petition of right* assented to by Charles the First, in the beginning of his reign. Such also, was the declaration of rights presented by the lords and commons to the prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights. It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing, they have no need of particular reservations. "WE THE PEOPLE of the United States, "to secure the blessings of liberty to ourselves and "our posterity, do *ordain* and *establish* this constitu- "tion for the United States of America:" This is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government.

But a minute detail of particular rights, is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns. If therefore the loud clamours against the plan of the convention, on this score, are well-founded, no epithets of reprobation will be too strong for the constitution of this state. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm, that bills of rights, in the

sense and to the extent they are contended for, are not only unnecessary, in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press, afforded a clear implication, that a right to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much has been said, I cannot forbear adding a remark or two: In the first place, I observe that there is not a syllable concerning it in the constitution of this state; in the next, I contend that whatever has been said about it in that of any other state, amounts to nothing. What signifies a declaration, that "the li- " berty of the press shall be inviolably preserved?"

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government*. And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights, in Great-Britain, form its constitution, and conversely the constitution of each state is its bill of rights. In like man-

* To show that there is a power in the constitution, by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said, that duties may be laid upon publications so high as to amount to a prohibition. I know not by what logic it could be maintained, that the declarations in the state constitutions, in favour of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the state legislatures. It cannot certainly be pretended, that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great-Britain, and yet it is notorious, that the press no where enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that after all, general declarations respecting the liberty of the press, will give it no greater security than it will have without them. The same invasions of it may be effected under the state constitutions which contain those declarations, through the means of taxation, as under the proposed constitution, which has nothing of the kind. It would be quite as significant to declare, that government ought to be free, that taxes ought not to be excessive, &c. as that the liberty of the press ought not to be restrained.

ner the proposed constitution, if adopted, will be the bill of rights of the union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the state constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are provided for in any part of the instrument which establishes the government. Whence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign to the substance of the thing.

Another objection, which, from the frequency of its repetition, may be presumed to be relied on, is of this nature: It is improper, (say the objectors,) to confer such large powers, as are proposed, upon the national government; because the seat of that government must of necessity be too remote from many of the states to admit of a proper knowledge on the part of the constituent, of

the conduct of the representative body. This argument, if it proves any thing, proves that there ought to be no general government whatever. For the powers which it seems to be agreed on all hands ought to be vested in the union, cannot be safely intrusted to a body which is not under every requisite control. But there are satisfactory reasons to show, that the objection is, in reality, not well founded. There is, in most of the arguments which relate to distance, a palpable illusion of the imagination. What are the sources of information by which the people in any distant country must regulate their judgment of the conduct of their representatives in the state legislature? Of personal observation they can have no benefit. This is confined to the citizens on the spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from the correspondences with their representatives, and with other persons who reside at the place of their deliberations.

It is equally evident that the like sources of information would be open to the people, in relation to the conduct of their representatives in the general government; and the impediments to a prompt communication which distance may be supposed to create, will be overbalanced by the effects of the vigilance of the state governments. The executive and legislative bodies of each state will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behaviour of those who represent

their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprize the community of whatever may prejudice its interests from another quarter may be relied upon, if it were only from the rivalship of power. And we may conclude with the fullest assurance, that the people, through that channel, will be better informed of the conduct of their national representatives, than they can be by any means they now possess, of that of their state representatives.

It ought also to be remembered, that the citizens who inhabit the country at and near the seat of government, will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance; and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the union.

Among the many curious objections which have appeared against the proposed constitution, the most extraordinary and the least colourable, is derived from the want of some provision respecting the debts due *to* the United States. This has been represented as a tacit relinquishment of those debts, and as a wicked contrivance to screen public defaulters. The newspapers have teemed with the most inflammatory railings on this head; yet there is nothing clearer than that the suggestion is entirely void of foundation, the offspring of extreme ignorance or extreme dishonesty. In addition to the remarks I have made upon the subject in another place, I shall only observe, that as it is a plain dictate of

common sense, so it is also an established doctrine of political law, that " *States neither lose any of their* " *rights, nor are discharged from any of their obliga-* " *tions, by a change in the form of their civil govern-* " *ment**."

The last objection of any consequence, at present recollected, turns upon the article of expense. If it were even true, that the adoption of the proposed government would occasion a considerable increase of expense, it would be an objection that ought to have no weight against the plan. The great bulk of the citizens of America, are with reason convinced that union is the basis of their political happiness. Men of sense of all parties now, with few exceptions, agree that it cannot be preserved under the present system, nor without radical alterations; that new and extensive powers ought to be granted to the national head, and that these require a different organization of the federal government; a single body being an unsafe depository of such ample authorities. In conceding all this, the question of expense is given up; for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are, in the first instance, to consist of only sixty-five persons; the same number of which congress, under the existing confederation, may be composed. It is true, that this number is intended to be increased; but this is to keep pace with the progress of the population and resources of the country. It is evident, that a less number would, even in the first instance, have been unsafe; and that a continuance of the present number would, in a more advanced stage

* Vide Rutherford's Institutes, vol. 2. book 11. chap. x. sect. xiv. and xv.—Vide also Grotius, book 11. chap. ix. sect. viii. and ix.

of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expense to spring? One source indicated, is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government, are the same which will be required under the new. There are now a secretary at war, a secretary for foreign affairs, a secretary for domestic affairs, a board of treasury consisting of three persons, a treasurer, assistants, clerks, &c. These offices are indispensable under any system, and will suffice under the new, as well as the old. As to ambassadors, and other ministers and agents in foreign countries, the proposed constitution can make no other difference, than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true, that these will form a very considerable addition to the number of federal officers; but it will not follow, that this will occasion an increase of public expense. It will be in most cases nothing more than an exchange of state for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The states individually, will stand in no need of any for this purpose. What difference can it make in point of expense, to pay officers of the customs appointed by the state, or by the United States?

Where then are we to seek for those additional articles of expense, which are to swell the account to the enormous size that has been represented? The

chief item which occurs to me, respects the support of the judges of the United States. I do not add the president, because there is now a president of congress, whose expenses may not be far, if any thing, short of those which will be incurred on account of the president of the United States. The support of the judges will clearly be an extra expense, but to what extent will depend on the particular plan which may be adopted in regard to this matter. But upon no reasonable plan can it amount to a sum which will be an object of material consequence.

Let us now see what there is to counterbalance any extra expense that may attend the establishment of the proposed government. The first thing which presents itself is, that a great part of the business that now keeps congress sitting through the year, will be transacted by the president. Even the management of foreign negociations will naturally devolve upon him, according to general principles concerted with the senate, and subject to their final concurrence. Hence it is evident, that a portion of the year will suffice for the session of both the senate and the house of representatives: we may suppose about a fourth for the latter, and a third, or perhaps half, for the former. The extra business of treaties and appointments may give this extra occupation to the senate. From this circumstance we may infer, that until the house of representatives shall be increased greatly beyond its present number, there will be a considerable saving of expense from the difference between the constant session of the present, and the temporary session of the future congress.

But there is another circumstance, of great im-

portance in the view of economy. The business of the United States has hitherto occupied the state legislatures, as well as congress. The latter has made requisitions which the former have had to provide for. It has thence happened, that the sessions of the state legislatures have been protracted greatly beyond what was necessary for the execution of the mere local business. More than half their time has been frequently employed in matters which related to the United States. Now the members who compose the legislatures of the several states amount to two thousand and upwards; which number has hitherto performed what, under the new system, will be done in the first instance by sixty-five persons, and probably at no future period by above a fourth or a fifth of that number. The congress under the proposed government will do all the business of the United States themselves, without the intervention of the state legislatures, who thenceforth will have only to attend to the affairs of their particular states, and will not have to sit in any proportion as long as they have heretofore done. This difference, in the time of the sessions of the state legislatures, will be clear gain, and will alone form an article of saving, which may be regarded as an equivalent for any additional objects of expense that may be occasioned by the adoption of the new system.

The result from these observations is, that the sources of additional expense from the establishment of the proposed constitution, are much fewer than may have been imagined; that they are counterbalanced by considerable objects of saving; and that, while it is questionable on which side the scale will preponderate, it is certain that a government

less expensive would be incompetent to the purposes of the union.

PUBLIUS.

NUMBER LXXXV.

BY MR. HAMILTON.

CONCLUSION.

ACCORDING to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion two points—"the analogy of the proposed government "to your own state constitution," and "the addi- "tional security which its adoption will afford to "republican government, to liberty, and to pro- "perty." But these heads have been so fully anticipated, and so completely exhausted in the progress of the work, that it would now scarcely be possible to do any thing more than repeat, in a more dilated form, what has been already said; which the advanced stage of the question, and the time already spent upon it, conspire to forbid.

It is remarkable, that the resemblance of the plan of the convention to the act which organizes the government of this state, holds, not less with regard to many of the supposed defects, than to the real excellences of the former. Among the pretended defects, are the re-eligibility of the executive; the want of a council; the omission of a formal bill of rights; the omission of a provision respecting the liberty of the press: these, and several others, which

have been noted in the course of our inquiries, are as much chargeable on the existing constitution of this state, as on the one proposed for the Union: and a man must have slender pretensions to consistency, who can rail at the latter for imperfections which he finds no difficulty in excusing in the former. —Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention, who profess to be devoted admirers of the government of this state, than the fury with which they have attacked that plan, for matters in regard to which our own constitution is equally, or perhaps more vulnerable.

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan, consist chiefly in the restraints which the preservation of the union will impose upon local factions and insurrections, and upon the ambition of powerful individuals in single states, who might acquire credit and influence enough, from leaders and favourites, to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the states in a disunited situation; in the express guarantee of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the state governments, which have undermined the foundations of property and credit; have planted mutual distrust in the breasts of all classes of citi-

zens; and have occasioned an almost universal prostration of morals.

Thus have I, fellow-citizens, executed the task I had assigned to myself; with what success your conduct must determine. I trust, at least, you will admit, that I have not failed in the assurance I gave you respecting the spirit with which my endeavours should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual changes which have been rung upon the wealthy, the well-born, and the great, are such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations, which have been in various ways practised to keep the truth from the public eye, are of a nature to demand the reprobation of all honest men. It is possible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend: It is certain that I have frequently felt a struggle between sensibility and moderation; and if the former has in some instances prevailed, it must be my excuse, that it has been neither often nor much.

Let us now pause, and ask ourselves whether, in the course of these papers, the proposed constitution has not been satisfactorily vindicated from the asper-

sions thrown upon it; and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. It is one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party: Let him reflect, that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation: And let him remember, that a majority of America has already given its sanction to the plan which he is to approve or reject.

I shall not dissemble, that I feel an entire confidence in the arguments which recommend the proposed system to your adoption; and that I am unable to discern any real force in those by which it has been assailed. I am persuaded, that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan, that it has not a claim to absolute perfection, have afforded matter of no small triumph to its enemies. Why, say they, should we adopt an imperfect thing? Why not amend it, and make it perfect before it is irrevocably established? This may be plausi-

ble, but it is plausible only. In the first place I remark, that the extent of these concessions has been greatly exaggerated. They have been stated as amounting to an admission, that the plan is radically defective; and that without material alterations, the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be found, who will not declare as his sentiment, that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such an one as promises every species of security which a reasonable people can desire.

I answer in the next place, that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the union to the jeopardy of successive experiments, in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies, must necessarily be a compound as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct states in a common bond of amity and union, must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet lately published in this city, * unanswerably show the utter improbability of assembling a new

* Entitled "An address to the people of the state of New-York."

convention, under circumstances in any degree so favourable to a happy issue, as those in which the late convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worth the perusal of every friend to his country. There is however one point of light in which the subject of amendments still remains to be considered; and in which it has not yet been exhibited. I cannot resolve to conclude, without first taking a survey of it in this aspect.

It appears to me susceptible of complete demonstration, that it will be far more easy to obtain subsequent than previous amendments to the constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each state. To its complete establishment throughout the union, it will therefore require the concurrence of thirteen states. If, on the contrary, the constitution should once be ratified by all the states as it stands, alterations in it may at any time be effected by nine states. In this view alone the chances are as thirteen to nine * in favour of subsequent amendments rather than of the original adoption of an entire system.

This is not all. Every constitution for the United States must inevitably consist of a great variety of particulars, in which thirteen independent states are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very

* It may rather be said TEN, for though two-thirds may set on foot the measure, three-fourths must ratify.

different combinations of the parts upon different points. Many of those who form the majority on one question, may become the minority on a second, and an association dissimilar to either, may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner, as to satisfy all the parties to the compact; and hence also an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point; no giving nor taking. The will of the requisite number, would at once bring the matter to a decisive issue. And consequently whenever nine*, or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly prevail. There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance, a complete constitution.

In opposition to the probability of subsequent amendments, it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part, I acknowledge a thorough conviction that any amendments which may, upon

* See note in the preceding page.

mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observations just stated. I also think there is little force in it on another account. The intrinsic difficulty of governing THIRTEEN STATES, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers, the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this, that the national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan, the congress will be *obliged*, "on the application of the legislatures of two-thirds of the states, "(which at present amount to nine,) to call a convention for proposing amendments, which *shall be* "*valid* to all intents and purposes, as part of the "constitution, when ratified by the legislatures of "three-fourths of the states, or by conventions in "three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to discretion. Of consequence all the declamation about the disinclination to a change, vanishes in air. Nor, however difficult it may be supposed to unite two-thirds, or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legis-

latures to erect barriers against the encroachments of the national authority.

If the foregoing argument be a fallacy, certain it is, that I am myself deceived by it; for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of mathematical demonstration. Those who see the matter in the same light, however zealous they may be for amendments, must agree in the propriety of a previous adoption, as the most direct road to their object.

The zeal for attempts to amend, prior to the establishment of the constitution, must abate in every man, who is ready to accede to the truth of the following observations of a writer, equally solid and ingenious: "To balance a large state or society, (says "he,) whether monarchical or republican, on general laws, is a work of so great difficulty, that no "human genius, however comprehensive, is able by "the mere dint of reason and reflection, to effect "it. The judgments of many must unite in the "work: EXPERIENCE must guide their labour; TIME "must bring it to perfection: and the FEELING of "inconveniences must correct the mistakes which "they *inevitably* fall into, in their first trials and experiments*." These judicious reflections contain a lesson of moderation to all the sincere lovers of the union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the states from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a

* Hume's Essays, vol. I. page 128.—The rise of arts and sciences.

defect of political fortitude, but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION without a NATIONAL GOVERNMENT, is an awful spectacle. The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. In so arduous an enterprise, I can reconcile it to no rules of prudence to let go the hold we now have, upon seven out of the thirteen states; and after having passed over so considerable a part of the ground, to re-commence the course. I dread the more the consequences of new attempts, because I KNOW that POWERFUL INDIVIDUALS, in this and in other states, are enemies to a general national government in every possible shape.

PUBLIUS.

LETTERS

OF

PACIFICUS.

WRITTEN BY MR. HAMILTON.

LETTERS, *&c.*

NUMBER I.

As attempts are making, very dangerous to the peace, and it is to be feared, not very friendly to the constitution of the United States, it becomes the duty of those who wish well to both, to endeavour to prevent their success.

The objections which have been raised against the proclamation of neutrality, lately issued by the President, have been urged in a spirit of acrimony and invective, which demonstrates that more was in view than merely a free discussion of an important public measure. They exhibit evident indications of a design to weaken the confidence of the people in the author of the measure, in order to remove or lessen a powerful obstacle to the success of an opposition to the government, which, however it may change its form according to circumstances, seems still to be persisted in with unremitting industry.

This reflection adds to the motives connected with the measure itself, to recommend endeavours, by proper explanations, to place it in a just light. Such explanations at least cannot but be satisfactory to those who may not themselves have leisure or opportunity for pursuing an investigation of the sub-

ject, and who may wish to perceive that the policy of the government is not inconsistent with its obligations or its honour.

The objections in question fall under four heads:

1. That the proclamation was without authority.

2. That it was contrary to our treaties with France.

3. That it was contrary to the gratitude which is due from this to that country, for the succours afforded to us in our own revolution.

4. That it was out of time, and unnecessary.

In order to judge of the solidity of the first of these objections, it is necessary to examine what is the nature and design of a proclamation of neutrality.

It is to *make known* to the powers at war, and to the citizens of the country whose government does the act, that such country is in the condition of a nation at peace with the belligerent parties, and under no obligations of treaty to become an *associate in the war* with either, and that this being its situation, its intention is to observe a correspondent conduct, by performing towards each the duties of neutrality; to warn all persons within the jurisdiction of that country, to abstain from acts that shall contravene those duties, under the penalties which the laws of the land, of which the *jus gentium* is part, will inflict.

This, and no more, is conceived to be the true import of a proclamation of neutrality.

It does not imply, that the nation which makes the declaration, will forbear to perform to either of the warring powers any stipulations in treaties which can be executed, without becoming a *party* in the war. It therefore does not imply in our case, that the United States will not make those distinctions

between the present belligerent powers, which are stipulated in the 7th and 22d articles of our treaty with France: because they are not incompatible with a state of neutrality: and will in no shape render the United States an *associate* or *party* in the war. This must be evident, when it is considered, that even to furnish *determinate* succours of ships or troops, to a power at war, in consequence of *antecedent treaties having no particular reference to the existing quarrel*, is not inconsistent with neutrality: a position equally well established by the doctrines of writers, and the practice of nations*.

But no special aids, succours, or favours, having relation to war, not positively and precisely stipulated by some treaty of the above description, can be afforded to either party, without a breach of neutrality.

In stating that the proclamation of neutrality does not imply the non-performance of any stipulations of treaties, which are not of a nature to make the nation an associate in the war, it is conceded, that an execution of the clause of guarantee, contained in the eleventh article of our treaty of alliance with France, would be contrary to the sense and spirit of the proclamation; because it would engage us with our whole force, as an *auxiliary* in the war; it would be much more than the case of a definite succour, previously ascertained.

It follows, that the proclamation is virtually a manifestation of the sense of the government, that the United States are, *under the circumstances of the case, not bound* to execute the clause of guarantee.

If this be a just view of the force and import of

* See Vatel, Book III. Ch. 6. Sec. 101.

the proclamation, it will remain to see, whether the president, in issuing it, acted within his proper sphere, or stepped beyond the bounds of his constitutional authority and duty.

It will not be disputed, that the management of the affairs of this country with foreign nations, is confided to the government of the United States.

It can as little be disputed, that a proclamation of neutrality, when a nation is at liberty to decline or avoid a war in which other nations are engaged, and means to do so, is a *usual* and a *proper* measure. *Its main object is to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principles of neutrality* ;* an object of the greatest moment to a country, whose true interest lies in the preservation of peace.

The inquiry then is, what department of our government is the proper one to make a declaration of neutrality, when the engagements of the nation permit, and its interests require that it should be done?

A correct mind will discern at once, that it can belong neither to the legislative nor judicial department, of course must belong to the executive.

The legislative department is not the *organ* of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties. It is therefore not naturally that member of the government, which is to pronounce the existing condition of the nation, with regard to foreign powers, or to admonish the citizens of their obligations and duties in consequence; still less is it

* See Vatel, Book III. Chap. 7. Sec. 113.

charged with enforcing the observance of those obligations and duties.

It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department, is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon.

It must then of necessity belong to the executive department to exercise the function in question, when a proper case for it occurs.

It appears to be connected with that department in various capacities. As the *organ* of intercourse between the nation and foreign nations; as the *interpreter* of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the *power*, which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force.

This view of the subject is so natural and obvious, so analogous to general theory and practice, that no doubt can be entertained of its justness, unless to be deduced from particular provisions of the constitution of the United States.

Let us see then, if cause for such doubt is to be found there.

The second article of the constitution of the United States, section first, establishes this general proposition, that "the EXECUTIVE POWER shall be vested "in a President of the United States of America."

The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.*

It would not consist with the rules of sound construction, to consider this enumeration of particular authorities, as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable, that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, "All legislative powers herein granted shall be vested in a Congress of the United States." In that which grants the executive power, the expressions are, "The *executive power* shall be vested in a President of the United States."

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the constitution, and with the principles of free government.

The general doctrine of our constitution then is, that the *executive power* of the nation is vested in the president; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.

Two of these have been already noticed: the participation of the senate in the appointment of officers, and in the making of treaties. A third remains to be mentioned; the right of the legislature "to de-"clare war, and grant letters of marque and re-"prisal."

With these exceptions, the *executive power* of the United States is completely lodged in the president. This mode of construing the constitution, has indeed been recognized by congress in formal acts, upon full consideration and debate: of which the power of removal from office, is an important instance. It will follow, that if a proclamation of neutrality is merely an executive act, as it is believed has been shown, the step which has been taken by the president is liable to no just exception on the score of authority.

It may be said, that this inference would be just if the power of declaring war had not been vested in the legislature, but that this power naturally includes the right of judging, whether the nation is or is not under obligations to make war.

The answer is, that however true this position may be, it will not follow, that the executive is in

any case excluded from a similar right of judgment, in the execution of its own functions.

If on the one hand the legislature have a right to declare war, it is, on the other, the duty of the executive to preserve peace, till the declaration is made ; and in fulfilling this duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government: and when it has concluded that there is nothing in them inconsistent with neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the nation. The executive is charged with the execution of all laws, the law of nations, as well as the municipal law, by which the former are recognized and adopted. It is consequently bound, by executing faithfully the laws of neutrality, when the country is in a neutral position, to avoid giving cause of war to foreign powers.

This is the direct end of the proclamation of neutrality. It declares to the United States their situation with regard to the contending parties, and makes known to the community, that the laws incident to that state will be enforced. In doing this, it conforms to an established usage of nations, the operation of which, as before remarked, is to obviate, a responsibility on the part of the whole society, for secret and unknown violations of the rights of any of the warring powers by its citizens.

Those who object to the proclamation will readily admit, that it is the right and duty of the executive to interpret those articles of our treaties which give to France particular privileges, in order to the enforcement of them: But the necessary consequence of this is, that the executive must judge what are

their proper limits; what rights are given to other nations, by our contracts with them; what rights the law of nature and nations gives and our treaties permit, in respect to those countries with which we have none; in fine, what are the reciprocal rights and obligations of the United States, and of all, and each, of the powers at war.

The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged*, the treaties between the nations, so far at least as regards *public* rights, are of course suspended.

This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance *offensive* and defensive between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition, to become an associate in the war with France, and would have laid the legislature under an obligation if required, and there was otherwise no valid excuse, of exercising its power of declaring war.

This serves as an example of the right of the executive in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.

The division of the executive power in the constitution, creates a *concurrent* authority in the cases to which it relates.

Hence, in the instance stated, treaties can only be made by the president and senate jointly, but their activity may be continued or suspended by the president alone.

No objection has been made to the president's having acknowledged the Republic of France, by the reception of its minister, without having consulted the senate; though that body is connected with him in the making of treaties, and though the consequence of his act of reception is to give operation to those heretofore made with that country. But he is censured for having declared the United States to be in a state of peace and neutrality, with regard to the powers at war; because the right of *changing* that state, and *declaring war*, belongs to the legislature.

It deserves to be remarked, that as the participation of the senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general "executive power," vested in the president; they are to be construed strictly,

and ought to be extended no further than is essential to their execution.

While, therefore, the legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers.

In this distribution of authority, the wisdom of our constitution is manifested. It is the province and duty of the executive to preserve to the nation the blessings of peace. The legislature alone can interrupt them by placing the nation in a state of war.

But though it has been thought adviseable to vindicate the authority of the executive on this broad and comprehensive ground, it was not absolutely necessary to do so. That clause of the constitution which makes it his duty to "take care that the laws "be faithfully executed," might alone have been relied upon, and this simple process of argument pursued.

The president is the constitutional EXECUTOR of the laws. Our treaties, and the laws of nations, form a part of the law of the land. He who is to execute the laws, must first judge for himself of their meaning. In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the president to judge for himself, whether there was any thing in our treaties incompatible with an adherence to neutrality. Having decided that there was not, he had a right, and if in his opin-

ion the interest of the nation required it, it was his duty as executor of the laws, to proclaim the neutrality of the nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non-observance.

The proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact* with regard to the *existing state* of the nation; informs the citizens of what the laws previously established require of them in that state, and notifies them that these laws will be put in execution against the infractors of them.

NUMBER II.

THE second and principal objection to the proclamation, namely, that it is inconsistent with the treaties between the United States and France, will now be examined.

It has been already shown, that it does not militate against the performance of any of the stipulations in those treaties, which would not make us an associate or party in the war, and especially that it does not interfere with the privileges secured to France by the seventeenth and twenty-second articles of the treaty of commerce; which, except the clause of guarantee, constitute the most material discriminations to be found in our treaties in favour of that country.

Official documents have likewise appeared in the

public papers, which serve as a comment upon the sense of the proclamation in this particular, proving that it was not deemed by the executive incompatible with the performance of the stipulations in those articles, and that in practice they are intended to be observed.

It has, however, been admitted, that the declaration of neutrality excludes the idea of an execution of the clause of guarantee.

It becomes necessary therefore to examine, whether the United States would have a valid justification for not complying with it, in case of their being called upon for that purpose by France.

Without knowing how far the reasons which have occurred to me may have influenced the president, there appear to me to exist very good and substantial grounds for a refusal.

The alliance between the United States and France, is of the defensive kind. In the caption it is denominated a "treaty of alliance eventual and defen- "sive." In the body, (article the second,) it is called a defensive alliance. The words of that article are as follow: "the essential and direct end of the pre- "sent defensive alliance is to maintain effectually "the liberty, sovereignty, and independence, abso- "lute and unlimited, of the United States, as well "in matters of government, as of commerce."

The leading character then of our alliance with France being defensive, it will follow that the meaning, obligation, and force, of every stipulation in the treaty, must be tested by the principles of such an alliance; unless in any instance terms have been used which clearly and unequivocally denoted a different intent.

The principal question consequently is: What is

the nature and effect of a defensive alliance? When does the *casus federis* take place, in relation to it?

Reason, the concurring opinions of writers, and the practice of nations, will all answer: "When either "of the allies is *attacked*, when war is *made upon* "*him*, not when he *makes war upon another*:" in other words, "the stipulated assistance is to be given "when our ally is engaged in a defensive, not when "he is engaged in an offensive war." This obligation to assist only in a defensive war, constitutes the essential difference between an alliance which is merely defensive, and one which is both offensive and defensive. In the latter case, there is an obligation to co-operate as well when the war, on the part of our ally, is of the latter, as when it is of the former description. To affirm, therefore, that the United States are bound to assist France in the war in which she is at present engaged, will be to convert our treaty with her into an alliance offensive and defensive, contrary to the express and reiterated declarations of the instrument itself.

This assertion implies, that the war in question is an offensive war on the part of France.

And so it undoubtedly is, with regard to all the powers with whom she was at war, at the time of issuing the proclamation.

No position is better established, than that the nation which first declares, or actually begins a war, whatever may have been the causes leading to it, is that which makes an offensive war. Nor is there any doubt, that France first declared and began the war, against Austria, Prussia, Savoy, Holland, England, and Spain.

Upon this point there is apt to be some incorrectness of ideas. Those who have not examined

subjects of such a nature, are led to imagine that the party which commits the first injury, or gives the first provocation, is on the offensive side, though hostilities are actually begun by the other party.

But the cause or the occasion of the war, and the war itself, are things entirely distinct. It is the commencement of the war itself which decides the question, whether it be offensive or defensive. All writers on the laws of nations agree in this doctrine, but it is most accurately laid down in the following extracts from Burlamaqui*.

" Neither are we to believe, (says he,) that he " who first injures another, begins by that an offen- " sive war, and that the other who demands the " satisfaction for the injury received, is always on " the defensive. There are a great many unjust " acts, which may kindle a war, and which, how- " ever, are not the war itself; as the ill treatment " of a prince's ambassadors, the plundering of his " subjects," &c.

If, therefore, we take up arms to revenge such an unjust act, we commence an offensive, but a just war; and the prince who has done the injury, and will not give satisfaction, makes a defensive, but an unjust war.

We must therefore affirm, in general, that the first who takes up arms, whether justly or unjustly, commences an offensive war; and he who opposes him, whether with or without reason, begins a defensive war.

France then being on the offensive in the present war, and our alliance with her being defensive only,

* Vol. II. Book IV. Chap. III. sect. 4, 5.

it follows, that the *casus fœderis*, or condition of our guarantee, cannot take place; and that the United States are free to refuse a performance of that guarantee, if demanded.

Those who are disposed to justify indiscriminately every thing in the conduct of France, may reply, that though the war, in point of form, may be offensive on her part, yet in point of principle, it is defensive; was in each instance, a mere anticipation of attacks meditated against her, and was justified by previous aggressions of the opposite parties.

It is believed, that it would be a sufficient answer to this observation to say, that in determining the legal and positive obligations of the United States, the only point of inquiry is, whether the war was in fact begun by France, or by her enemies; that all beyond this is too vague, too liable to dispute, too much matter of opinion, to be a proper criterion of national conduct; that when a war breaks out between two nations, all others in regard to the positive rights of the parties, and their positive duties towards them, are bound to consider it as equally just on both sides; that consequently in a defensive alliance, when war is made upon one of the allies, it is the duty of the other to fulfil the conditions stipulated on its part, without inquiry, whether the war is rightfully begun or not; as, on the other hand, when war is commenced by one of the allies, the other is exempted from the obligation to assist, however just the commencement of it may have been.

This doctrine is founded upon the utility of clear and certain rules for determining the reciprocal duties of nations, in order that as little as possible may

be left to opinion, and to the subterfuges of an over-refining or unfaithful casuistry.

Some writers indeed of high authority affirm, that it is a tacit condition of every alliance, that one ally is not bound to assist the other in a war manifestly unjust. But this is questioned by other respectable authorities on the ground which has been stated. And though the manifest injustice of the war has been affirmed by some, to be a good cause for not executing the formal obligations of a treaty, I have no where seen it maintained, that the abstract justice of a war will of itself oblige a nation to do what its formal obligations do not enjoin: If this, however, were not the true doctrine, an impartial examination would prove that, with respect to some of the powers, France is not blameless in the circumstances which preceded and led to the war; that if she received, she also gave causes of offence, and that the justice of the war, on her side, is in those cases not a little problematical.

There are prudential reasons, which dissuade from going largely into this examination, unless it shall be rendered necessary by the future turn of the discussion.

It will be sufficient here, to notice cursorily, the following facts:

France committed an aggression upon Holland, in declaring the navigation of the Scheldt free, and acting upon that declaration; contrary to treaties in which she had explicitly acknowledged, and even guaranteed, the exclusive right of Holland to the use of that river; and contrary also to the doctrines of the best writers, and the established usages of nations in such cases.

She gave a general and very serious cause of

alarm and umbrage by the decree of the 19th of November, 1792, whereby the convention, in the name of the French nation, declare, that they will grant fraternity and assistance to *every people* who wish to recover their liberty; and charge the executive power to send the necessary orders to the generals, to give assistance to such people, and to defend those citizens who have been, or who may be vexed for the cause of liberty; which decree was ordered to be printed in all languages.

This very extraordinary decree amounted exactly to what France herself had most complained of; an interference by one nation in the internal government of another.

When a nation has actually come to a resolution to throw off a yoke, under which it may have groaned, and to assert its liberties, it is justifiable and meritorious in another, to afford assistance to the one which has been oppressed, and is in the act of liberating itself; but it is not warrantable for any nation beforehand, to hold out a general invitation to insurrection and revolution, by promising to assist every people who may wish to recover their liberty, and to defend those citizens of every country, who have been, or who may be vexed for the cause of liberty: still less to commit to the generals of its armies the discretionary power of judging, when the citizens of a foreign country have been vexed for the cause of liberty by their own government.

For Vatel justly observes, as a consequence of the liberty and independence of nations, "that it does "not belong to any foreign power, to take cogniz- "ance of the administration of the sovereign of "another country, to set himself up as a judge of "his conduct, or to oblige him to alter it."

It had a natural tendency to disturb the tranquillity of nations, and to excite every where fermentation and revolt: It therefore justified neutral powers, who were in a situation to be affected by it, in taking measures to repress the spirit by which it had been dictated.

But the principle of that decree received a more particular application to Great-Britain, by some subsequent circumstances.

Among the proofs of this are two answers, which were given by the president of the National Convention, at a public sitting on the 28th of November, to two different addresses; one presented by a deputation from "The Society for Constitutional In-"formation in London," the other by a deputation of English and Irish citizens at Paris.

The following are extracts from these answers:

"The shades of Penn, of Hambden, and of Syd-"ney, hover over your heads; and the moment, "without doubt, approaches, in which the French "will bring congratulations to the National Conven-"tion of Great-Britain."

"Nature and principles draw towards us England, "Scotland, and Ireland. Let the cries of friendship "resound through the two REPUBLICS."—"Princi-"ples are waging war against tyranny, which will "fall under the blows of Philosophy. ROYALTY "in Europe is either destroyed, or on the point of "perishing, on the ruins of feudality: and the de-"claration of rights placed by the side of thrones, "is a devouring fire which will consume them—"Worthy REPUBLICANS," &c.

Declarations of this sort, cannot but be viewed as a direct application of the principle of the decree to Great-Britain; and as an open patronage of a revo-

lution in that country; a conduct which, proceeding from the head of the body that governed France, in the presence and on behalf of that body, was unquestionably an offence and injury to the nation to which it related.

The decree of the 15th November, is a further cause of offence to all the governments of Europe. By that decree "the French nation declares, that it "will treat as enemies the people, who, refusing or "renouncing liberty and equality, are desirous of "preserving their prince and privileged casts, or "of entering into an accommodation with them," &c. This decree was little short of a declaration of war against all nations having princes and privileged classes.

The formal and definitive annexion to France of the territories over which her arms had temporarily prevailed, is another violation of just and moderate principles, into which the convention was betrayed by an intemperate zeal, if not by a culpable ambition; and of a nature to justify the jealousy and ill will of every neighbouring state.

The laws of nations give to a power at war, nothing more than a usufructuary or possessory right to the territories which it acquires; suspending the absolute property and dominion, till a treaty of peace, or something equivalent, shall have ceded or relinquished the conquered territory to the conqueror. This rule is one of primary importance to the tranquillity and security of nations—facilitating an adjustment of their quarrels, and the preservation of ancient limits.

But France, by incorporating with herself in several instances the territories she had acquired, violated that rule, and multiplied infinitely the obstacles

to peace and accommodation. The doctrine, that a nation cannot consent to its own dismemberment, but in a case of extreme necessity, immediately attached itself to all the conquered territories: while the progressive augmentation of the dominions of the most powerful empire in Europe, on a principle, not of temporary possession, but of permanent acquisition, threatened the independence of all other countries, and gave to neighbouring neutral powers the justest cause of discontent and apprehension. It is a principle well agreed, and founded on substantial reasons, that whenever a particular state adopts maxims of conduct contrary to those generally established among nations, calculated to interrupt their tranquillity, and to expose their safety, they may justifiably make common cause to resist and control the state which manifests a disposition so suspicious and exceptionable.

Whatever partiality may be entertained for the general object of the French revolution, it is impossible for any well informed or sober minded man, not to condemn the proceedings which have been stated, as repugnant to the rights of nations, to the true principles of liberty, to the freedom of opinion of mankind; or not to acknowledge as a consequence of this, that the justice of the war on the part of France, with regard to some of the powers with which she is engaged, is from those causes questionable enough to free the United States from all embarrassment on that score, if indeed it be at all incumbent upon them to go into the inquiry.

The policy of a defensive alliance is so essentially distinct from that of an offensive one, that it is every way important not to confound their effects. The first kind has in view the prudent object of

mutual defence, when either of the allies is involuntarily forced into a war by the attack of some third power. The latter subjects the peace of each ally to the will of the other, and obliges each to partake in the other's wars of policy and interest, as well as in those of safety and defence. To preserve their boundaries distinct, it is necessary that each kind should be governed by plain and obvious rules.

This would not be the case, if, instead of taking as a guide the simple fact of who began the war, it was necessary to travel into metaphysical niceties about the justice or injustice of the causes which led to it.

Inasmuch also as the not furnishing a stipulated succour, when it is due, is itself a cause of war, it is very requisite that there should be some palpable criterion for ascertaining when it is due. This criterion, as before observed, in a defensive alliance, is the commencement or not, of the war by our ally, as a mere matter of fact.

Other topics, serving to illustrate the position, that the United States are not bound to execute the clause of guarantee, are reserved for another paper.

NUMBER III.

FRANCE, at the time of issuing the proclamation, was engaged in war with a considerable part of Europe, and likely to be embroiled with almost all the rest, without a single ally in that quarter of the globe.

In such a situation it is evident, that however she may be able to defend herself at home, of which her factions and internal agitations furnish the only serious doubt, she cannot make external efforts in

any degree proportioned to those which can be made against her.

This state of things alone discharges the United States from an obligation to embark in her quarrel.

It is known, that we are wholly destitute of naval force. France, with all the great maritime powers united against her, is unable to supply this deficiency. She cannot afford us that species of co-operation which is necessary to render our efforts useful to her, and to prevent our experiencing the destruction of our trade, and the most calamitous inconveniences in other respects.

Our guarantee does not look to France herself. It does not relate to her immediate defence, but to the defence and preservation of her American colonies; objects of which she might be deprived, and yet remain a great, a powerful, and a happy nation.

In the actual situation of this country, and in relation to a matter of only secondary importance to France, it may fairly be maintained, that an ability in her to supply in a competent degree our deficiency of naval force, is a condition of our obligation to perform the guarantee on our part.

Had the United States a powerful marine, or could they command one in time, this reasoning would not be solid; but circumstanced as they are, it is presumed to be well founded.

There would be no proportion between the mischiefs and perils to which the United States would expose themselves, by embarking in the war; and the benefit which the nature of their stipulation aims at securing to France, or that which it would be in their power actually to render her by becoming a party.

This disproportion would be a valid reason for not

executing the guarantee. All contracts are to receive a reasonable construction. Self-preservation is the first duty of a nation; and though in the performance of stipulations relating to war, good faith requires that its ordinary hazards should be fairly met, because they are directly contemplated by such stipulations, yet it does not require that extraordinary and extreme hazards should be run; especially where the object to be gained or secured is only a partial or particular interest of the ally, for whom they are to be encountered.

As in the present instance, good faith does not require that the United States should put in jeopardy their essential interests, perhaps their very existence, in one of the most unequal contests in which a nation could be engaged, to secure to France—What? Her West-India Islands, and other less important possessions in America. For it is always to be remembered, that the stipulations of the United States do, in no event, reach beyond this point. If they were upon the strength of their guarantee, to engage in the war, and could make any arrangement with the belligerent powers, for securing to France those islands and those possessions, they would be at perfect liberty instantly to withdraw. They would not be bound to prosecute the war one moment longer.

They are under no obligation in any event, as far as the faith of treaties is concerned, to assist France in defence of her liberty; a topic on which so much has been said, so very little to the purpose, as it regards the present question.

The contest in which the United States would plunge themselves, were they to take part with France, would possibly be still more unequal than

that in which France herself is engaged. With the possessions of Great-Britain and Spain on both flanks, the numerous Indian tribes under the influence and direction of those powers, along our whole interior frontier, with a long extended sea coast, with no maritime force of our own, and with the maritime force of all Europe against us, with no fortifications whatever, and with a population not exceeding four millions: it is impossible to imagine a more unequal contest, than that in which we should be involved in the case supposed. From such a contest we are dissuaded by the most cogent motives of self-preservation, no less than of interest.

We may learn from Vatel, one of the best writers on the laws of nations, that "if a state, which has "promised succours, finds itself unable to furnish "them, its very inability is its exemption; and if "the furnishing the succours would expose it to an "evident danger, this also is a lawful dispensation. "The case would render the treaty pernicious to "the state, and therefore not obligatory. But this "applies to an imminent danger threatening the "safety of the state; the case of such a danger is "tacitly and necessarily reserved in every treaty*."

If too, as no sensible and candid man will deny, the extent of the present combination against France, is in a degree to be ascribed to imprudences on her part; the exemption to the United States, is still more manifest and complete. No country is bound to partake in hazards of the most critical kind, which may have been produced or promoted by the indiscretion and intemperance of another.

This is an obvious dictate of reason, with which

* See Book III. Chap. VI. Sect. 92.

the common sense and common practice of mankind coincide.

To the foregoing considerations, it may perhaps be added, with no small degree of force, that military stipulations in national treaties, contemplate only the ordinary case of foreign war, and are irrelative to the contests which grow out of revolutions of government; unless where they have express reference to a revolution begun, or where there is a guarantee of the existing constitution of the nation, or where there is a personal alliance for the defence of a prince and his family*.

The revolution in France is the primitive source of the war in which she is engaged. The restoration of the monarchy, is the avowed object of some of her enemies, and the implied one of all. That question then is essentially involved in the principle of the war; a question, certainly never in the contemplation of the government with which our treaty was made, and it may thence be fairly inferred, never intended to be embraced by it.

The inference is, that the United states fulfilled the utmost that could be claimed by the nation of France, when they so far respected its decision as to recognize the newly constituted authorities; giving operation to the treaty of alliance for future occasions, but considering the present war as a tacit exception. Perhaps too, this exception is, in other respects, due to the circumstances under which the engagements between the two countries were contracted. It is impossible, prejudice apart, not to perceive a delicate embarrassment between the theory and fact of our political relations to France.

* Puffendorf, Book VIII. Chap. IX. Sect. 9.

On these grounds, also, as well as that of the present war being offensive on the side of France, the United States have valid and honourable pleas to offer against the execution of the guarantee, if it should be claimed by France. And the president was in every view fully justified in pronouncing, that the duty and interest of the United States dictated a neutrality in the war.

NUMBER IV.

A THIRD objection to the proclamation is, that it is inconsistent with the gratitude due to France for the services rendered to us in our revolution.

Those who make this objection, disavow, at the same time, all intention to maintain the position, that the United States ought to take part in the war. They profess to be friends to our remaining at peace. What then do they mean by the objection?

If it be no breach of gratitude to refrain from joining France in the war, how can it be a breach of gratitude to declare, that such is our disposition and intention?

The two positions are at variance with each other; and the true inference is, either that those who make the objection really wish to engage this country in the war, or that they seek a pretext for censuring the conduct of the chief magistrate, for some purpose very different from the public good.

They endeavour in vain to elude this inference by saying, that the proclamation places France upon

an equal footing with her enemies; while our treaties require distinctions in her favour, and our relative situation would dictate kind offices to her, which ought not to be granted to her adversaries.

They are not ignorant that the proclamation is reconcileable with both those objects, as far as they have any foundation in truth or propriety.

It has been shown, that the promise of a "friendly and impartial conduct" towards all the belligerent powers, is not incompatible with the performance of any stipulations in our treaties, which would not include our becoming an associate in the war; and it has been observed, that the conduct of the executive, in regard to the seventeenth and twenty-second articles of the treaty of commerce, is an unequivocal comment upon the terms. They were indeed, naturally to be understood, with the exception of those matters of positive compact, which would not amount to taking part in the war; for a nation then observes a friendly and impartial conduct towards two contending powers, when it only performs to one of them what it is obliged to do by stipulations in antecedent treaties, which do not constitute a participation in the war.

Neither do those expressions imply, that the United States will not exercise their discretion in doing kind offices to some of the parties, without extending them to the others, so long as they have no relation to war: for kind offices of that description may, consistently with neutrality, be shown to one party and refused to another.

If the objectors mean, that the United States ought to favour France, in things relating to war, and where they are not bound to do it by treaty; they must in this case also abandon their pretension of being friends

to peace. For such a conduct would be a violation of neutrality, which could not fail to produce war.

It follows then, that the proclamation is reconcileable with all that those who censure it contend for: taking them upon their own ground, that nothing is to be done incompatible with the preservation of peace.

But though this would be a sufficient answer to the objection under consideration, yet it may not be without use, to indulge some reflections on this very favourite topic of gratitude to France; since it is at this shrine that we are continually invited to sacrifice the true interests of the country; as if "all for love, and the world well lost," were a fundamental maxim in politics.

Faith and Justice between nations, are virtues of a nature the most necessary and sacred. They cannot be too strongly inculcated, nor too highly respected. Their obligations are absolute, their utility unquestionable; they relate to objects which with probity and sincerity generally admit of being brought within clear and intelligible rules.

But the same cannot be said of gratitude. It is not very often that between nations, it can be pronounced with certainty, that there exists a solid foundation for the sentiment; and how far it can justifiably be permitted to operate, is always a question of still greater difficulty.

The basis of gratitude is a benefit received or intended, which there was no right to claim, originating in a regard to the interest or advantage of the party on whom the benefit is, or is meant to be conferred. If a service is rendered from views relative to the immediate interest of the party who performs it, and is productive of reciprocal advantages, there seems scarcely in such a case, to be an adequate ba-

sis for a sentiment like that of gratitude. The effect at least would be wholly disproportioned to the cause, if such a service ought to beget more than a disposition to render in turn a correspondent good office, founded on mutual interest and reciprocal advantage. But gratitude would require much more than this; it would exact, to a certain extent, even a sacrifice of the interest of the party obliged, to the service or benefit of the one by whom the obligation had been conferred.

Between individuals, occasion is not unfrequently given for the exercise of gratitude. Instances of conferring benefits from kind and benevolent dispositions or feelings towards the person benefited, without any other interest on the part of the person who renders the service, than the pleasure of doing a good action, occur every day among individuals. But among nations they perhaps never occur. It may be affirmed as a general principle, that the predominant motive of good offices from one nation to another, is the interest or advantage of the nation which performs them.

Indeed the rule of morality in this respect is not precisely the same between nations, as between individuals. The duty of making its own welfare the guide of its actions, is much stronger upon the former than upon the latter; in proportion to the greater magnitude and importance of national, compared with individual happiness, and to the greater permanency of the effects of national than of individual conduct. Existing millions, and for the most part, future generations, are concerned in the present measures of a government: while the consequences of the private actions of an individual ordinarily

terminate with himself, or are circumscribed within a narrow compass.

Whence it follows, that an individual may on numerous occasions meritoriously indulge the emotions of generosity and benevolence, not only without an eye to, but even at the expense of his own interest.

But a government can rarely, if at all, be justifiable in pursuing a similar course; and if it does so, ought to confine itself within much stricter bounds*. Good offices which are indifferent to the interest of a nation performing them, or which are compensated by the existence or expectation of some reasonable equivalent; or which produce an essential good to the nation to which they are rendered, without real detriment to the affairs of the benefactors, prescribe perhaps the limits of national generosity or benevolence.

It is not here meant to recommend a policy absolutely selfish or interested in nations; but to show, that a policy regulated by their own interest, as far as justice and good faith permit, is, and ought to be, their prevailing one: and that either to ascribe to them a different principle of action, or to deduce from the supposition of it arguments for a self-denying and self-sacrificing gratitude, on the part of a nation which may have received from another good offices, is to misrepresent or misconceive what usually are, and ought to be, the springs of national conduct.

These general reflections will be auxiliary to a

* This conclusion derives confirmation from the reflection, that under every form of government, rulers are only trustees for the happiness and interest of their nation, and cannot, consistently with their trust, follow the suggestions of kindness or humanity towards others, to the prejudice of their constituents.

just estimate of our real situation with regard to France: of which a closer view will be taken in a succeeding paper.

NUMBER V.

FRANCE, the rival, time immemorial, of Great-Britain, had, in the course of the war which ended in 1763, suffered from the successful arms of the latter, the severest losses and the most mortifying defeats. Britain from that moment had acquired an ascendant in the affairs of Europe, and in the commerce of the world, too decided and too humiliating to be endured without extreme impatience, and an eager desire of finding a favourable opportunity to destroy it, and to repair the breach which had been made in the national glory. The animosity of wounded pride, conspired with the calculations of interest, to give a keen edge to that impatience, and to that desire.

The American revolution offered the occasion. It early attracted the notice of France, though with extreme circumspection. As far as countenance and aid may be presumed to have been given prior to the epoch of the acknowledgment of our independence, it will be no unkind derogation to assert, that they were marked neither with liberality nor with vigour; that they wore the appearance rather of a desire to keep alive disturbances which might embarrass a rival, than of a serious design to assist a revolution, or a serious expectation that it could be effected.

The victories of Saratoga, the capture of an army, which went a great way towards deciding the issue of the contest, decided also the hesitations of France. They established in the government of that country, a confidence of our ability to accomplish our purpose, and as a consequence of it, produced the treaties of alliance and commerce.

It is impossible to see in all this any thing more than the conduct of a jealous competitor, embracing a most promising opportunity to repress the pride, and diminish the power of a dangerous rival, by seconding a successful resistance to its authority, with the object of lopping off a valuable portion of its dominions. The dismemberment of this country from Great-Britain was an obvious, and a very important interest of France. It cannot be doubted, that it was both the determining motive and an adequate compensation, for the assistance afforded to us.

Men of sense in this country, derived encouragement to the part which their zeal for liberty prompted them to take in our revolution, from the probability of the co-operation of France and Spain. It will be remembered, that this argument was used in the publications of the day; but upon what was it bottomed? Upon the known competition between those nations and Great-Britain, upon their evident interest to reduce her power and circumscribe her empire; not certainly upon motives of regard to our interest, or of attachment to our cause. Whoever should have alleged the latter, as the grounds of the expectation held out, wouldh ave been then justly considered as a visionary or a deceiver. And whoever shall now ascribe to such motives the aid which we did receive, would not deserve to be viewed in a better light.

The inference from these facts is not obscure. Aid and co-operation, founded upon a great interest, pursued and obtained by the party rendering them, is not a proper stock upon which to engraft that enthusiastic gratitude, which is claimed from us by those who love France more than the United States.

This view of the subject, extorted by the extravagancy of such a claim, is not meant to disparage the just pretensions of France to our good will. Though neither in the motives to the succours which she furnished, nor in their extent, (considering how powerfully the point of honour, in such war, reinforced the considerations of interest when she was once engaged,) can be found a sufficient basis for that gratitude which is the theme of so much declamation: Yet we shall find, in the manner of affording them, just cause for our esteem and friendship.

France did not attempt, in the first instance, to take advantage of our situation to extort from us any humiliating or injurious concessions, as the price of her assistance; nor afterwards, in the progress of the war, to impose hard terms as the condition of particular aids.

Though this course was certainly dictated by policy, yet it was a magnanimous policy, such as always constitutes a title to the approbation and esteem of mankind, and a claim to the friendship and acknowledgment of the party in whose favour it is practised.

But these sentiments are satisfied on the part of a nation, when they produce sincere wishes for the happiness of the party from whom it has experienced such conduct, and a cordial disposition to render all good and friendly offices, which can be rendered

without prejudice to its own solid and permanent interests.

To ask of a nation so situated, to make a sacrifice of substantial interest; to expose itself to the jealousy, ill will, or resentment of the rest of the world; to hazard, in an eminent degree, its own safety, for the benefit of the party who may have observed towards it the conduct which has been described; would be to ask more than the nature of the case demands, more than the fundamental maxims of society authorize, more than the dictates of sound reason justify.

A question has arisen, with regard to the proper object of that gratitude, which is so much insisted upon: whether it be the unfortunate Prince by whom the assistance received was given; or the nation of whom he was the chief, or the organ? It is extremely interesting to the national justice, to form right conceptions on this point.

The arguments which support the latter idea, are as follow:

" Louis the XVI. was but the constitutional agent " of the French people. He acted for and on be- " half of the nation; it was with their money and " their blood he supported our cause. It is to " them, therefore, not to him, that our obligations " are due. Louis the XVI. in taking our part, was no " doubt actuated by state policy. An absolute " prince could not love liberty. But the people of " France patronized our cause with zeal, from sym- " pathy in its object. The people, therefore, not its " monarch, are entitled to our sympathy."

This reasoning may be ingenious, but it is not founded in nature or fact.

Louis the XVI. though no more than the consti-

tutional agent of the nation, had at the time the sole power of managing its affairs, the legal right of directing its will and its force. It belonged to him to assist us or not, without consulting the nation; and he did assist without such consultation. His will alone was active; that of the nation passive. If there was kindness in the decision, demanding a return of good will, it was the kindness if Louis XVI.; his heart was the depository of the sentiment. Let the genuine voice of nature then, unperverted by political subtleties, pronounce whether the acknowledgment which may be due for that kindness, can be equitably transferred from him to others who had no share in the decision; whether the principle of gratitude ought to determine us to behold with indifference his misfortunes, and with satisfaction the triumphs of his foes.

The doctrine, that the prince is the organ of his nation, is conclusive to enforce the obligations of good faith between two states: in other words, the observance of duties stipulated in treaties for national purposes; and it will even suffice to continue to a nation a claim to the friendship and good will of another, resulting from friendly offices done by its prince; but it would be to carry the principle much too far, and to render it infinitely too artificial to attribute to it the effect of transferring such a claim from the prince to the nation, by way of opposition and contrast. Friendship, good will, gratitude for favours received, have so inseparable a reference to the motives with which, and to the persons by whom they were rendered, as to be incapable of being transferred to another at his expense.

But Louis XVI. it is said, acted from reasons of state, without regard to our cause; while the peo-

ple of France patronized it with zeal and attachment.

As far as the assertion with regard to the monarch may be well founded, and is an objection to our gratitude to him, it destroys the whole fabric of gratitude to France: for our gratitude is, and must be, relative to the services performed. The nation can only claim it on the score of their having been rendered by their agent with their means. If the views with which he performs them, divested them of the merit which ought to inspire gratitude, none is due. The nation, no more than their agent, can claim it.

With regard to the individual good wishes of the citizens of France, as they did not produce the services rendered to us as a nation, they can be no foundation for national gratitude. They can only call for a reciprocation of individual good wishes. They cannot form the basis of public obligation.

But the assertion takes more for granted than there is reason to believe true.

Louis the XVI. no doubt took part in our contest from reasons of state; but Louis the XVI. was a man humane and kind hearted. The acts of his early youth had entitled him to this character. It is natural for a man of this disposition to become interested in the cause of those whom he protects or aids; and if the concurrent testimony of the period may be credited, there was no man in France more personally friendly to the cause of this country than Louis the XVI. I am much misinformed, if repeated declarations of the venerable Franklin did not attest this fact.

It is a just tribute to the people of France to admit, that they manifested a lively interest in the

cause of America; but while motives are scanned, who can say how much of it is to be ascribed to the antipathy which they bore to their rival neighbour; how much to their sympathy in the object of our pursuit? It is certain that the love of liberty was not a national sentiment in France, when a zeal for our cause first appeared among that people.

There is reason to believe too, that the attachment to our cause, which ultimately became very extensive, if not general, did not originate with the mass of the French people. It began with the circles more immediately connected with the court, and was thence diffused through the nation.

This observation, besides its tendency to rectify ideas, which are calculated to give a false current to the public feeling, may serve to check the spirit of illiberal invective, which has been wantonly indulged against those distinguished friends of America, who, though the authors of the French revolution, have fallen victims to it; because their principles would not permit them to go the whole length of an entire subversion of the monarchy.

The preachers of gratitude are not ashamed to brand Louis the XVI. as a tyrant, La Fayette as a traitor. But how can we wonder at this, when they insinuate a distrust even of a ————!!!

In urging the friendly disposition to our cause, manifested by the people of France, as a motive to our gratitude towards that people, it ought not to be forgotten, that those dispositions were not confined to the inhabitants of that country. They were eminently shared by the people of the United Provinces, produced to us valuable pecuniary aids from their citizens, and eventually involved them in the war on the same side with us. It may be added too,

that here the patronage of our cause emphatically began with the mass of the community, not originating as in France with the government, but finally implicating the government in the consequences.

Our cause had also numerous friends in other countries; even in that with which we were at war. Conducted with prudence, moderation, justice, and humanity, it may be said to have been a popular cause among mankind, conciliating the countenance of princes, and the affection of nations.

The dispositions of the individual citizens of France, can therefore in no sense be urged, as constituting a peculiar claim to our gratitude. As far as there is foundation for it, it must be referred to the services rendered to us; and in the first instance, to the unfortunate monarch that rendered them. This is the conclusion of nature and reason.

NUMBER VI.

THE very men who not long since, with a holy zeal would have been glad to make an *auto de fe* of any one who should have presumed to assign bounds to our obligations to Louis the XVI. are now ready to consign to the flames, those who venture even to think that he died a proper object of our sympathy or regret. The greatest pains are taken to excite against him our detestation. His supposed perjuries and crimes are sounded in the public ear, with all the exaggerations of intemperate declaiming. All the unproved and contradicted allegations, which

have been brought against him are taken for granted, as the oracles of truth, on no better grounds than the mere general presumptions, that he could not have been a friend to a revolution which stripped him of so much power; that it is not likely the convention would have pronounced him guilty, and consigned him to so ignominious a fate, if he had been really innocent.

It is possible that time may disclose facts and proofs, which will substantiate the guilt imputed to Louis: but these facts and proofs have not yet been authenticated to the world; and justice admonishes us to wait for their production and authentication.

Those who have most closely attended to the course of their transaction, find least cause to be convinced of the criminality of the deceased monarch. While his counsel, whose characters give weight to the assertions, with an air of conscious truth, boldly appeal to facts and proofs, in the knowledge and possession of the convention, for the refutation of the charges brought against him, the members of that body, in all the debates upon the subject which have reached this country, either directly from France, or circuitously through England, appear to have contented themselves with assuming the existence of the facts charged, and inferring from them a criminality which, after the abolition of the royalty, they were interested to establish.

The presumption of guilt drawn from the suggestions which have been stated, are more than counterbalanced by an opposite one, which is too obvious not to have occurred to many, though I do not recollect yet to have met with it in print. It is this:

If the convention had possessed clear evidence of the guilt of Louis, they would have promulgated it

to the world in an authentic and unquestionable shape. Respect for the opinion of mankind, regard for their own character, the interest of their cause, made this an indispensable duty; nor can the omission be satisfactorily ascribed to any other reason than the want of such evidence.

The inference is, that the melancholy catastrophe of Louis XVI. was the result of a supposed political expediency, rather than of real criminality.

In a case so circumstanced, does it, can it consist with our justice or our humanity, to partake in the angry and vindictive passions which it is endeavoured to excite against the unfortunate monarch? Was it a crime in him to have been born a prince? Could this circumstance forfeit his title to the commiseration due to his misfortunes as a man?

Would gratitude dictate to a people, situated as are the people of this country, to lend their aid to extend to the son the misfortunes of the father? Should we not be more certain of violating no obligation of that kind, and of not implicating the delicacy of our national character, by taking no part in the contest, than by throwing our weight into either scale?

Would not a just estimate of the origin and progress of our relations to France, viewed with reference to the mere question of gratitude, lead us to this result—that we ought not to take part against the son and successor of a father, on whose sole will depended the assistance which we received; that we ought not to take part with him against the nation whose blood and whose treasure had been, in the hands of the father, the means of that assistance?

But we are sometimes told, by way of answer, that the cause of France is the cause of liberty; and that we are bound to assist the nation on the

score of their being engaged in the defence of that cause. How far this idea ought to carry us, will be the subject of future examination.

It is only necessary here to observe, that it presents a question essentially different from that which has been in discussion. If we are bound to assist the French nation, on the principle of their being embarked in the defence of liberty, this is a consideration altogether foreign to that of gratitude. Gratitude has reference only to kind offices received. The obligation to assist the cause of liberty, must be deduced from the merits of that cause, and from the interest we have in its support. It is possible that the benefactor may be on one side: the defenders and supporters of liberty on the other. Gratitude may point one way, the love of liberty another. It is therefore important to just conclusions, not to confound the two things.

A sentiment of justice, more than the importance of the question itself, has led to so particular a discussion respecting the proper object of whatever acknowledgment may be due from the United States, for the aid which they received from France during their own revolution.

The extent of the obligation which it may impose, is by far the most interesting inquiry. And though it is presumed, that enough has been already said to evince, that it does in no degree require us to embark in the war; yet there is another, and a very simple view of the subject, which is too convincing to be omitted.

The assistance derived from France was afforded by a great and powerful nation, possessing numerous armies, a respectable fleet, and the means of rendering it a match for the force to be encountered. The

position of Europe was favourable to the enterprise; a general disposition prevailing to see the power of Britain abridged. The co-operation of Spain was very much a matter of course, and the probability of other powers becoming engaged on the same side not remote. Great-Britain was alone, and likely to continue so: France had a great and persuasive interest in the separation of this country from her. In this situation, with much to hope and little to fear, she took part in our quarrel.

France is at this time singly engaged with the greatest part of Europe, including all the first rate powers, except one, and in danger of being engaged with the rest. To use the emphatic language of a member of the national convention, she has but one enemy, and that is all Europe. Her internal affairs are, without doubt, in serious disorder. Her navy comparatively inconsiderable. The United States are a young nation: their population, though rapidly increasing, still small; their resources, though growing, not great; without armies, without fleets; capable, from the nature of the country and the spirit of its inhabitants, of immense exertions for self-defence, but little capable of those external efforts which could materially serve the cause of France. So far from having any direct interest in going to war, they have the strongest motives of interest to avoid it. By embarking with France in the war, they would have incomparably more to apprehend than to hope.

This contrast of situations and inducements, is alone a conclusive demonstration, that the United States are not under an obligation, from gratitude, to join France in the war. The utter disparity between the circumstances of the service to be render-

ed, and of the service received, proves that the one cannot be an adequate basis of obligation for the other. There would be a manifest want of equality, and consequently of reciprocity.

But complete justice would not be done to this question of gratitude, were no notice to be taken of the address which has appeared in the public papers, (the authenticity of which has not been impeached,) from the convention of France to the United States, announcing the appointment of the present minister plenipotentiary. In that address the convention informs us, that "the support which the ancient "French court had afforded the United States to "recover their independence, was only the fruit of "a base speculation; and that their glory offended "its ambitious views, and the ambassadors of France "bore the criminal orders of stopping the career of "their prosperity."

If this information is to be admitted in the full force of the terms, it is very fatal to the claim of gratitude towards France. An observation similar to one made in a former paper occurs here. If the organ of the nation, on whose will the aid which was given depended, acted not only from motives irrelative to our advantage, but from unworthy motives, or, as is alleged, from a base speculation: if afterwards he displayed a temper hostile to the confirmation of our security and prosperity, he acquired no title to our gratitude in the first instance, or he forfeited it in the second. And the people of France, who can only demand it in virtue of the conduct of their agent, must, together with him, renounce the pretension. It is an obvious principle, that if a nation can claim merit from the good deeds of its sove-

reign, it must answer for the demerit of his misdeeds.

But some deductions are to be made from the suggestions in the address of the convention, on account of the motives which evidently dictated the communication. Their zeal to alienate the good will of this country from the late monarch, and to increase the odium of the French nation against the monarchy, which was so ardent as to make them overlook the tendency of their communication, to deprive their votaries among us of the plea of gratitude, may justly be suspected of exaggeration.

The truth probably is, that the base speculation charged, amounts to nothing more than that the government of France, in affording us assistance, was actuated by the motives which have been attributed to it, namely, the desire of promoting the interest of France, by lessening the power of Great-Britain, and opening a new channel of commerce to herself; that the orders said to have been given to the ambassadors of France, to stop the career of our prosperity, are resolvable into a speculative jealousy of the ministers of the day, lest the United States, by becoming as powerful and great as they are capable of being under an efficient government, might prove formidable to the European possessions in America. With these qualifications, the address offers no new discovery to the intelligent and unbiassed friends of their country. They knew long ago, that the interest of France had been the governing motive of the aid afforded; and they saw clearly enough in the conversation and conduct of her agents, while the present constitution of the United States was under consideration, that the government, of which they were the instruments, would have preferred our re-

maining under the old form. They perceived also, that these views had their effect upon some of the devoted partizans of France among ourselves; as they now perceive, that the same characters are embodying, with all the aid they can obtain, under the same banner, to resist the operation of that government of which they withstood the establishment.

All this was, and is seen; and the body of the people of America are too discerning to be long in the dark about it: too wise to have been misled by foreign or domestic machinations, they adopted a constitution which was necessary to their safety and to their happiness: too wise still to be ensnared by the same machinations, they will support the government they have established, and will take care of their own peace, in spite of the insidious efforts which are employed to detach them from the one, and to disturb the other.

The information which the address of the convention contains, ought to serve as an instructive lesson to the people of this country. It ought to teach us not to over-rate foreign friendships; and to be upon our guard against foreign attachments. The former will generally be found hollow and delusive; the latter will have a natural tendency to lead us aside from our own true interest, and to make us the dupes of foreign influence. Both serve to introduce a principle of action, which, in its effects, if the expression may be allowed, is anti-national. Foreign influence is truly the Grecian horse to a republic. We cannot be too careful to exclude its entrance.—Nor ought we to imagine, that it can only make its approaches in the gross form of direct bribery. It is then most dangerous when it comes under the patronage of our passions, under the auspices of national prejudice and partiality.

I trust the morals of this country are yet too good to leave much to be apprehended on the score of bribery. Caresses, condescensions, flattery in unison with our prepossessions, are infinitely more to be feared: and as far as there is opportunity for corruption, it is to be remembered, that one foreign power can employ this resource as well as another; and that the effect must be much greater, when it is combined with other means of influence, than where it stands alone.

NUMBER VII.

THE remaining objection to the proclamation of neutrality, still to be discussed, is, that it was out of time and unnecessary.

To give colour to this objection, it is asked, why did not the proclamation appear when the war commenced with Austria and Prussia? why was it forborne, till Great-Britian, Holland, and Spain, became engaged? why did not the government wait, till the arrival at Philadelphia of the minister of the French republic? why did it volunteer a declaration not required of it by any of the belligerent parties?

To most of these questions, solid answers have already appeared in the public prints. Little more can be done, than to repeat and enforce them.

Austria and Prussia are not maritime powers. Contraventions of neutrality as against them, were not likely to take place to any extent, or in a shape that would attract their notice. It would therefore have

been useless, if not ridiculous, to have made a formal declaration on the subject, while they were the only parties opposed to France.

But the reverse of this is the case with regard to Spain, Holland, and England. These are all commercial and maritime nations. It was to be expected, that their attention would be immediately drawn towards the United States with sensibility, and even with jealousy. It was to be feared, that some of our citizens might be tempted by the prospect of gain to go into measures which would injure them, and hazard the peace of the country. Attacks by some of these powers upon the possessions of France in America, were to be looked for as a matter of course. While the views of the United States, as to that particular, were problematical, they would naturally consider us as a power that might become their enemy. This they would have been the more apt to do, on account of those public demonstrations of attachment to the cause of France, of which there has been so prodigal a display. Jealousy, every body knows, especially if sharpened by resentment, is apt to lead to ill treatment; ill treatment to hostility.

In proportion to the probability of our being regarded with a suspicious, and consequently an unfriendly eye, by the powers at war with France; in proportion to the danger of imprudences being committed by any of our citizens which might occasion a rupture with them, the policy on the part of the government, of removing all doubt as to its own disposition, and of deciding the condition of the United States, in the view of the parties concerned, became obvious and urgent.

Were the United States now, what, if we do not rashly throw away the advantages we possess, they

may expect to be in fifteen or twenty years, there would have been more room for an insinuation which has been thrown out, namely, that they ought to have secured to themselves some advantage, as the consideration of their neutrality; an idea, however, the justice and magnanimity of which cannot be commended. But in their present situation, with their present strength and resources, an attempt of that kind could have only served to display pretensions at once excessive and unprincipled. The chance of obtaining any collateral advantage, if such a chance there was, by leaving a doubt of our intentions, as to peace or war, could not wisely have been put, for a single instant, in competition with the tendency of a contrary conduct to secure our peace.

The conduciveness of the declaration of neutrality to that end, was not the only recommendation to the adoption of the measure. It was of great importance that our own citizens should understand, as soon as possible, the opinion which the government entertained of the nature of our relations to the warring parties, and of the propriety or expediency of our taking a side, or remaining neuter. The arrangements of our merchants could not but be very differently affected by the one hypothesis or the other; and it would necessarily have been very detrimental and perplexing to them to have been left in uncertainty. It is not requisite to say, how much our agriculture and other interests would have been likely to have suffered by embarrassments to our merchants.

The idea of its having been incumbent on the government to delay the measure for the arrival of the minister of the French republic, is as absurd as it is humiliating. Did the executive stand in need of

the logic of a foreign agent to enlighten it as to the duties or interests of the nation? or was it bound to ask his consent to a step which appeared to itself consistent with the former, and conducive to the latter?

The sense of our treaties was to be learnt from the instruments themselves. It was not difficult to pronounce beforehand, that we had a greater interest in the preservation of peace, than in any advantages with which France might tempt our participation in the war. Commercial privileges were all that she could offer of real value in our estimation, and a *carte blanche* on this head, would have been an inadequate recompense for renouncing peace, and committing ourselves voluntarily to the chances of so precarious and perilous a war. Besides, if the privileges which might have been conceded were not founded in a real permanent mutual interest, of what value would be the treaty that should concede them? Ought not the calculation, in such case, to be upon a speedy resumption of them, with perhaps a quarrel as the pretext? On the other hand, may we not trust that commercial privileges which are truly founded in mutual interest, will grow out of that interest; without the necessity of giving a premium for them at the expense of our peace?

To what purpose then was the executive to have waited for the arrival of the minister? was it to give opportunity to contentious discussions; to intriguing machinations; to the clamours of a faction won to a foreign interest?

Whether the declaration of neutrality, issued upon or without the requisition of any of the belligerent powers, can only be known to their respective ministers, and to the proper officers of our govern-

ment. But if it be true, that it issued without any such requisition, it is an additional indication of the wisdom of the measure.

It is of much importance to the end of preserving peace, that the belligerent nation should be thoroughly convinced of the sincerity of our intentions to observe the neutrality we profess; and it cannot fail to have weight in producing this conviction, that the declaration of it was a spontaneous act; not stimulated by any requisition on the part of either of them; but proceeding purely from our own view of our duty and interest.

It was not surely necessary for the government to wait for such a requisition; while there were advantages, and no disadvantages, in anticipation. The benefit of an early notification to our merchants, conspired with the consideration just mentioned to recommend the course which was pursued.

If, in addition to the rest, the early manifestation of the views of the government has had any effect in fixing the public opinion on the subject, and in counteracting the success of the efforts, which it was to be foreseen would be made to distract and disunite, this alone would be a great recommendation of the policy of having suffered no delay to intervene.

What has been already said in this and in preceding papers, affords a full answer to the suggestion, that the proclamation was unnecessary. It would be a waste of time to add more.

But there has been a criticism several times repeated, which may deserve a moment's attention. It has been urged, that the proclamation ought to have contained some reference to our treaties, and that the generality of the promise to observe a conduct *friendly* and *impartial* towards the belligerent powers, ought

to have been qualified with expressions equivalent to these, "*as far as may consist with the treaties of* "*the United States.*"

The insertion of such a clause would have entirely defeated the object of the proclamation, by rendering the intention of the government equivocal. That object was to assure the powers at war, and our own citizens, that in the opinion of the executive, it was consistent with the duty and interest of the nation to observe neutrality, and that it was intended to pursue a conduct corresponding with that opinion. Words equivalent to those contended for, would have rendered the other part of the declaration nugatory; *by leaving it uncertain, whether the executive did or did not believe a state of neutrality to be consistent with our treaties.* Neither foreign powers, nor our own citizens, would have been able to have drawn any conclusion from the proclamation, and both would have had a right to consider it as a mere equivocation.

By not inserting any such ambiguous expressions, the proclamation was susceptible of an intelligible and proper construction. While it denoted, on the one hand, that in the judgment of the executive, there was nothing in our treaties obliging us *to become a party in the war*, it left it to be expected, on the other, that all stipulations compatible with neutrality, according to the laws and usages of nations, would be enforced. It follows, that the proclamation was, in this particular, exactly what it ought to have been.

The words, "make known the disposition of the "United States," have also given a pretext for cavil. It has been asked, how could the president undertake to declare the disposition of the United

States? The people, for aught he knew, may have a very different sentiment. Thus a conformity with republican propriety and modesty, is turned into a topic of accusation.

Had the president announced his own disposition, he would have been chargeable with egotism, if not presumption. The constitutional organ of intercourse between the United States and foreign nations, whenever he speaks to them, it is in that capacity; it is in the name, and on the behalf of the United States. It must therefore be with greater propriety, that he speaks of their disposition, than of his own.

It is easy to imagine, that occasions frequently occur in the communications to foreign governments and foreign agents, which render it necessary to speak of the friendship or *friendly disposition* of the United States, of *their disposition* to cultivate harmony and good understanding, to reciprocate neighbourly offices, and the like. It is usual, for example, when public ministers are received, for some complimentary expressions to be interchanged. It is presumable, that the late reception of the French minister did not pass, without some assurance on the part of the president, of the friendly disposition of the United States towards France. Admitting it to have happened, would it be deemed an improper arrogation? If not, why was it more so, to declare the disposition of the United States to observe a neutrality in the existing war?

In all such cases, nothing more is to be understood, than an official expression of the *political* disposition of the nation, *inferred* from its political relations, obligations, and interests. It is never to be supposed, that the expression is meant to convey the

precise state of the individual sentiments or opinions of the great mass of the people.

Kings and princes speak of their own dispositions. The magistrates of republics, of the dispositions of their nations. The president, therefore, has evidently used the style adapted to his situation, and the criticism upon it is plainly a cavil.

PACIFICUS.

ERROR.—Page 50, No. LIV. of the Federalist, read Mr. JAY, instead of Mr. HAMILTON, as the author.

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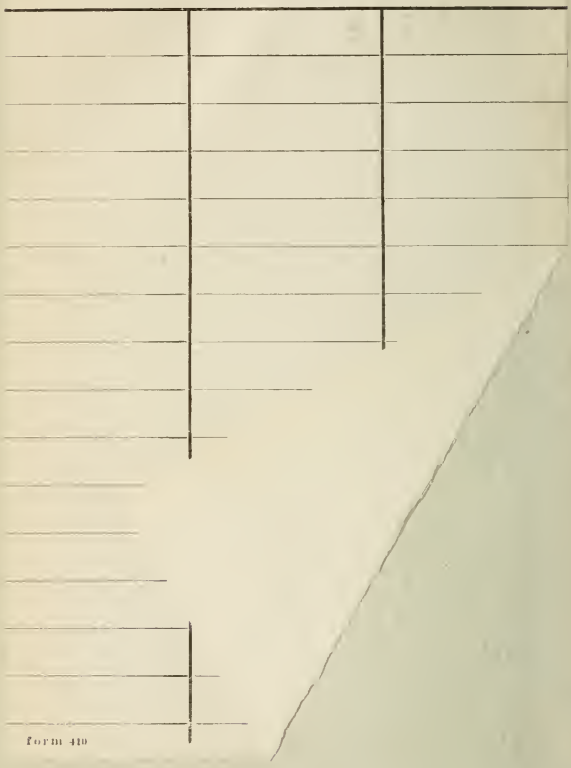

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